Supreme Court, U.S.
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87-219

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JACK D. BASTIEN, *et al.*,
Petitioners,

vs.

R. ROWLAND & CO., INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I

FIRST SANCTION

a. Whether the traditional due process safeguards of Notice and hearing on the record apply to sanctions to pay attorneys fees imposed upon Petitioners and then shifted to Petitioners' Attorneys.

1. Initially *Petitioners* were ordered to pay Respondents' Attorney fees for failure to appear at a deposition, in the sum of $2,025.75, even when Respondents had served Notice to take depositions in violation of prior Court Orders and Petitioners' Motion for Protective Order was not addressed;

2. Whether due process safeguards were applicable to the Attorneys for Petitioners when on *May 27, 1986,* well in excess of ten (10) days after Final Judgment entered on *March 31, 1986,* the District Judge *shifts* the sanction onto the Attorneys for Petitioner *without any Notice or hearing?*

II

SECOND SANCTION

a. Whether the traditional due process safeguards of Notice and hearing on the record apply to sanctions, more accurately characterized as a fine under *Rule 42 of the Fed. Rules of Crim. Proc.* and *18 U.S.C. 401* imposed by a Magistrate upon Attorneys for Petitioners on *December 18, 1985* when said Court made a *verbal order* appointing a Special Commissioner to preside over depositions and all costs of said Special Commissioner to be assessed against Attorneys for Petitioners without reimbursement from Petitioners because said Attorney raised the objection of Privileged Communication and violation of Work Product during deposition of Petitioner taken on December 17, 1985;

1. That, on *December 20, 1985,* the District Judge, without any appeal or written order before him *sustained* the *verbal*

order of the Magistrate and ordered a Special Commissioner to be appointed with all costs to be paid by Attorneys for Petitioners; and then on *March 12, 1986* shifts the $10,338.72 costs onto *Petitioners,* without Notice or hearing, and then on *May 8, 1986,* well in excess of ten (10) days after final judgment entered on *March 31, 1986,* the District Judge *again* shifts the fine and sanction upon the *Attorneys* for Petitioners *without any Notice or Hearing.*

2. Whether the due process rights of Attorneys for Petitioners and Petitioners' were further violated when the Court of Appeals had both *sanctions* before it by way of Writ of Mandamus filed by Petitioners on *January 6, 1986* and said Court denied said Writ of Mandamus on March 18, 1986, without prejudice, and directed Petitioners to raise the issues on appeal from final judgment but said Court failed in its "review" responsibilities when it failed to address said issues, as presented on Appeal, in their opinion of *March 25, 1987* and their denial of Petitioners' Rehearing en banc.

III

a. Whether the due process rights of Petitioners were violated by orders of the Magistrate and District Court "railroading" the discovery process and denying requests for trial continuances, denying requests to take depositions, denying requests to subpoena witnesses and parties beyond a 100 mile limit, denying requests to have expert witnesses and denying a request for a continuance and leave to withdraw even after lead counsel for Petitioners became ill and was unable to participate in depositions and at trial.

b. Whether the due process rights of Petitioners' were further violated when the Court of Appeals denied Petitioners' Writ of Mandamus without prejudice, and directed Petitioners to raise the issue on appeal after final judgment and then said Court of Appeals failed in its "review" responsibilities when it failed to address the issue in their opinion of *March 25, 1987* and their denial of Petitioners' Motion for Rehearing en banc.

IV

Whether the due process rights of Petitioners were violated by the improper granting of Summary Judgment after three (3) days of jury trial, and, instead of determining the existence of genuine issues of material fact for trial, in a complex case, did make conclusions of fact and made findings of fact adverse to Petitioners, expecially, when three (3) days before trial the District Court had denied the Respondents' Motions for Summary Judgment and found that there were genuine issues of material fact.

PARTIES BELOW

The parties are Jack D. Bastien, Arthur F. O'Hare, Jane S. Tschudy, E. Louis Werner, Jr., Michael J. Kickham, Arla E. Reed, Thomas W. Yager and Ronald B. Burt, all investors and Petitioners herein; R. Rowland and Co., Inc., a Missouri Corporation, broker and underwriter; Julius Weiss, Irwin M. Rosenthal, Jacob W. Heller, Herman Schwartzman, Leonard I. Weinstock, David M. Garelick, Andrew W. Dave, Marcel Shwergold, Elkan Abramowitz, Edmond M. Coller, Richard F. Horowitz, Howard L. Mann, E. Cooke Rand, Howard S. Jacobs, Mitchell R. Mass, Edward Fingerman, the Attorneys who prepared the Motion Picture Limited Partnership prospectus and performed other professional services for the partnerships; Weiss, Rosenthal, Heller and Schwartzman, a desolved Legal Partnership, the Law Firm which prepared the Motion Picture Limited Partnership prospectus and provided other legal services for the partnerships; Laventhol and Horwath, an Accounting Partnership which prepared the tax returns and performed other professional services for the partnerships; Richard W. A. Davis, individually, and Richard W. A. Davis, as Trustee for Richard W. A. Davis, Inc., a desolved Florida Corporation, the organizer, promoter and original general partners for various Motion Picture Limited Partnerships; Harold Rand, individually, and Harold Rand, d/b/a Harold Rand and Co., Public Relations, general partner of various limited partnerships; Joel Preston, general partner and appraiser of various Limited Partnerships; Irving Cohen, individually, Irving Cohen, d/b/a The Astro Group, Ltd., promoter, organizer and initial general partner of various Motion Picture Limited Partnerships; I.C.A. Productions, Inc., a desolved New York Corporation, organizer and promoter of various Motion Picture Limited Partnerships; Irving Cohen and Associates Investors, Inc., d/b/a Irving Cohen and Associates, Inc., a New York Corporation, promoter and organizer of various Motion Pictures Limited Partnerships, Stanley Levine, an original limited

general partner in a partnership and employee of Defendant Irving Cohen; Ted Shapiro, individually, and Ted Shapiro d/b/a The Astor Group Ltd., organizer, promoter and general partner of various Motion Picture Limited Partnerships; Raymond E. Rowland, Jr., President and employee of R. Rowland and Co., Inc. and Robert R. Rust, Vice President and employee of R. Rowland and Co., all Respondents herein.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. B, p. A-2)[1] is unreported. The opinion of the District Court (App. C, p. A-5) is reported at 631 F. Supp. 1554 (E.D. Mo. 1986).

JURISDICTION

The judgment of the Court of Appeals of the Eighth Circuit (App. B, p. A-2) was entered on March 25, 1987. The timely Petition for rehearing filed by Appellants on April 29, 1987 was denied on May 11, 1987 (App. A, p. A-1). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

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[1] App. refers to the appendix to this writ of certiorari.

STATEMENT OF THE CASE

1. BACKGROUND

Defendant R. Rowland & Co., Inc., a Missouri Brokerage Firm, through its officers and employees, sold all of the eight (8) Petitioners their interests in various Motion Picture Limited Partnerships beginning on or about June 1975 through March of 1976.

There was evidence of interlocking and "association in fact" of the Respondents Cohen/Shapiro/New York Limited Partnerships with the Respondent Davis/Florida Limited Partnerships. Respondent Rand was a co-organizer with Respondents Cohen/Shapiro in the Plaza Group (Def. App. p. 1838)[2], a co-organizer with Davis in Palm Air and Ruby (Def. App. p. 1874, 1887), a general partner for Shapiro/Cohen (as organizers) in Road Group and Dumont Group. (Def. App. p. 1824, 1828) and a general partner in the Davis Partnerships of Palm Air, Lakeworth, Coastal, Ruby, Plaza Group, Antares and Cypress. (Def. App. 1874, 1879, 1883, 1887, 1836) Respondent Attorneys were attorneys for both groups. Respondent Accountants are listed as accountants for the Davis/Florida partnerships and admit doing work on one Cohen/Shapiro partnership. There are documents showing they were accountants for other Cohen/Shapiro partnerships. (Def. App. p. 1692, 1894-99)

In August, 1975, Mr. Frank Johnson, a Florida Motion Picture Broker in 1974 - 1976, came to St. Louis and spoke to James Wilcox, Vice President of Respondent R. Rowland & Co. and in charge of the Tax Shelter Department. (Add. p. 1-3)[3]

He sold several films to Respondent Davis. He told Wilcox that many of the films actually purchased by certain partner-

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[2] Def. App. refers to the Deferred Appendix filed with the Court of Appeals with Petitioners' Appellate Brief.

[3] Add. refers to the Addendum filed with Petitioners Brief to the Court of Appeals.

ships were as low as $15,000.00 and one (1) was purchased for Davis for One Hundred Thousand Dollars (Add. p. 1-4) rather than the Two Million Five Hundred Thousand Dollars as shown in the offering material. (Def. App. 1941 (10)) When Mr. Johnson made inquiry as to what Respondent Rowland would charge to sell his limited partnership interest, he was told it *would be 10% plus a 2½ percent due diligence fee, plus 2½ percent "under the table".* (Add. p. 1-3)

Only two (2) of the eight (8) Petitioners were *provided* the offering material *prior* to the time they purchased their interest. (Depo. of Petit. Kickham, Vol. II p. 169; Depo. of Petit. Yager, p. 42) Six (6) of the Petitioners were not provided with the "confidential offering material prior to their purchase. (Answers to interrogatories of Petit. Tschudy, O'Hare, and Reed; Def. App. p. 188, 166, 177; Depo. of Petit. Bastien, p. 66-67; Depo. of Petit. O'Hare, Vol. II p. 12; Depo. of Petit. Burt, Vol. I p. 15-19; Depo. of Petit. Werner, Vol. I p. 45-50, 55-56) Instead, they were shown Memorandums prepared by R. Rowland & Co. entitled "For Brokers Use Only" or "Not For Public Use" by the solicitors which, according to the offering memorandum and the Respondents R. E. Rowland and R. Rust, were not to have been shown to potential investors. (Def. App. 1692-8, 1700-6) (Add. p. 15, 16) (Def. App. 126, 130-131, 154, 188) Petitioner Burt, was only shown the "appraisals" of the movies, which named the stars and the values placed upon the Motion Pictures. (Def. App. 1811-22) None of the Motion Picture Limited Partnerships made any profits. (Depo. of Resp. Cohen, p. 55 and Resp. Rand, p. 35). (*Deegan v. Commissioner,* 49 T.C.M. 1421, 1430 (1985), *aff'd* 787 F.2d 825 (2nd Cir. 1986).

In *August 1980,* Petitioners Bastien and O'Hare attended a meeting of Antares Associates. Donald Doerge, formally Vice President, General Office Manager for Respondent Rowland & Co., and who had sold Limited Partnership interests to several of the Petitioners did make the following statements. He stated that Respondent R. Rowland & Co. failed to properly in-

vestigate the Motion Pictures, had not conducted due diligence and the Motion Pictures were bought by the Partnerships for an amount less than shown in the prospectuses. (Def. App. 1921, 1922)

Mr. Bastien and Mr. O'Hare later attended a meeting on *December 13, 1980* where Mr. Doerge reiterated everything he stated at the August meeting and added that the Internal "For Brokerage Use Only" Memorandums were used as *sales gimmicks* to induce the prospective investors to invest by leading them to believe that they were receiving special inside information since they were prepared by Respondent, R. Rowland & Co. (Def. App. 1921, 1922) Petitioners Yager, Burt, Reed, Kickham, Tschudy and Werner had no inkling of fraud until late in 1981 and early 1982 and only after conferences with Petitioners' Counsel and Bastien and O'Hare.[4]

The Respondent Attorneys and Respondent Cohen represented to the Missouri Security Commission that sales commissions would not exceed ten (10%) percent. (Add. p. 35-38, Def. App. 1959, 1961-2)

According to Petitioners' one (1) liability expert witness, Grant Mitchell, the Limited Partnership prospectuses of the five partnerships which Mr. Mitchell had an opportunity to review, and in which the Petitioners had invested, were inconsistent in the following respects and had serious *omissions:* (1) The life of the Motion Picture was *ten years* but depreciation and investment tax credit was figured on a *five year life;* (2) The *projections* regarding the amount of revenue needed to pay the cost of the films was incorrect; (3) The prospectuses of Somerset, Avalon and Alpine *failed* to disclose the proper amount of revenue to pay off the non-recourse notes; (4) *None* of the prospectuses contained a financial forecast or stated a time period in which the revenues could be expected and which the deductions were to be claimed nor estimated an amount of income

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[4] See Dep. and Depo. Corr. Sheet.

due the partnerships upon foreclosure; (5) There was a failure of the tax opinion prepared by Respondent Schwartzman, to support its use of *gross receipts* and the calculations therein when the Internal Revenue Service regulations require "net receipts" to be used in "Income Forecasting" depreciation methods; and (6) The "Income Forecasting" method of depreciation, set out in documents provided to investors relating to expected tax deductions, were *inaccurate*. (Def. App. 982, 1930-10, 1969-9, 1907-11, Grant Mitchells' answers to interrogatories; Depo. of Grant Mitchell, p. 33-35, p. 48-52, p. 56)

Omitted in all the prospectuses for Antares, Cypress, Alpine, Avalon and Somerset was the specific price paid for the *copyrights* of the Motion Pictures. (Def. App. 1963, 1964, 1965, 1966, 1967) Respondent Schwartzman, at deposition and in Court, testified that *no copyrights* of the films were obtained for any of the thirty-five (35) Partnerships which Petitioners learned of by discovery. (T. III p. 33-34, T. II p. 112, 113;[5] Depo. of Herman Schwartzman, p. 81-82) The Acquisition Agreements obtained in discovery did show that *Fifty Thousand Dollars* and in one instance, *One Hundred Thousand Dollars,* was paid as part of the purchase price for the copyright of each Motion Picture. (Def. App. p. 1913(13), 1914(10), 1915(10), 1950(a))

Petitioners received only eighteen (18) of the forty-five (45) Distribution Agreements, the last few were received on *March 17, 1986,* the day the jury trial started and only twenty-three (23) of forty-five (45) Acquisition Agreements discovered by Petitioners. There was an *omission* in the prospectuses and the oral sales presentations that copyrights to the films that were purchased would not be registered with the United States Copyright Office. (Def. App. 1963-1967, Prospectuses; Def. App. 1712-1734, U.S. Copyright office documents; Depo. of Marla Muse, p. 13-14, p. 32-36; U.S. Copyright Office; Testimony of Resp. Schwartzmann, T. II, p. 112-113, T. III p. 33-34, Depo. of Resp. Schwartzmann p. 81-82.

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[5] T. I, etc. refers to trial transcripts.

Omitted from the offering material and not disclosed to Petitioners was that under the "Income Forecasting" method of depreciation there *must* be income equal to the percentage of the depreciation in order to properly apply "Income Forecasting". (Depo. of Grant Mitchell, p. 28) *Revenue Ruling* 60-358; *Revenue Ruling* 64-273) The evidence showed that Laventhol & Horwath, an International accounting firm, continued to file K-1 schedules for Petitioners to deduct the full amount of depreciation based on the original sales price of the films. (Def. App. Pretrial Compliance) The evidence showed they were receiving notices from the distributors in the first year of distribution as to the low-estimated future income of the films. (For example, not exceeding Two Thousand Five Hundred ($2,500.00) Dollars for the Motion Picture "Anonymous Avenger") (Add. p. 45)

Petitioners introduced evidence showing the interrelationship and integration between the Limited Partnerships and the Corporate entities in which funds were channeled by the General Partners. (App. D, p. A-19)

MATTERS ARISING AFTER SUIT

On June 15, 1982, Petitioners filed their original complaint, alleging securities violation under Rule 10(b)-5(1)(2) & (3); conspiracy to violate S.E.C. registration requirements for public offerings; Common Law Fraud, Breach of Fiduciary Duty and Conversion. Petitioners' suit was based primarily on *"material omissions"* and conspiracy. Petitioners pleaded a theory of "Fraud-on-the-Market Place". (Def. App. 312-314, Count III, beginning on p. 6 of Appellants Amended Petition) None of the Respondents filed *affirmative defenses* that the offerings were *private placements* or that they had performed *due diligence!* (Def. App. p. 61, 67, 80, 90, 95; Resps.' original answers) Petitioners initiated deposition discovery by Notice. Depositions commenced on *September 27, 1983* with Respondent Rust. (Def. App. p. 1996) Said Respondent, as well as Respondent R. Rowland & Co., refused to produce documents at said Deposi-

tion relating to the eighteen (18) Motion Picture Limited Partnerships sold during the 1974-1976 period and would only produce documents to the five (5) Partnerships in which the Petitioners had invested. Petitioners filed Motions to Compel on *September 27, 1983* with Magistrate Noce. (Def. App. p. 224, 227) This culminated in the Magistrate's Order, Memorandum, and Report and Recommendations dated *January 26, 1984.* (Def. App. 300, 298, 270) Petitioners were *limited* to documents which related to the five (5) partnerships in which they had invested, two (2) additional Limited Partnerships involved in a suit filed in a State Court proceeding not related to the Federal Court action; plus five (5) additional Partnerships requested by Petitioners from each of the Respondents. (Def. App. 302, 273-275) His order directed that there *would not be depositions until the documentary request had been resolved.* (Def. p. 299-303) He also ruled in his memorandum that the restrictions applied only to document requests and did not apply to "other discovery devises." (Def. App. 273-75)

Petitioners were not permitted to *contact any of the other investors without a Court Order!* (Def. App. 275)

On *February 14, 1984,* Petitioners requested leave to file an Amended Complaint adding a count under the *Racketeer Influenced Corrupt Organizations Act.* (Def. App. p. 305)

On *July 19, 1984,* District Judge Cahill stated that he would take Petitioners' request under advisement and would rule within ten (10) days. (Transcript of the July 19, 1984 Hearing, p. 30, Def. App. Vol. XVIII) *He directed that all discovery be held in abeyance until this matter was decided.* He also stated that the *case was one of the most complex cases in the District!* (Transcript of the *July 19, 1984* Hearing, p. 21, 26; Def. App. Vol. XVIII). The entire case was held in abeyance until *July 1985!* The case was assigned to District Judge George F. Gunn, Jr. who had just been appointed to the Federal Bench. On *July 31, 1985,* Judge Gunn had an informal hearing with all counsel. No transcript was taken. A discovery schedule was generally agreed upon with a suggestive cut off date for discovery of

January 31, 1986 and trial setting of March 17, 1986. Petitioners agreed that only if Respondents would *comply* with the discovery orders of Judge Noce and Judge Cahill by *August 31, 1985,* would they be in agreement with the discovery cutoff dates and the trial date.

Respondent R. Rowland & Co.'s Counsel offered to prepare a draft of the proposed order and did so, but his draft left out the Court's direction and order that Petitioners could file a RICO Amendment. (Def. App. p. 1998)

Petitioners' Counsel then submitted a proposed order which also included that portion of the District Judge's direction that all discovery orders would be complied with by *August 31, 1985.* However, the District Judge did not sign the order until *September 3, 1985.* (Def. App. 390) *None* of the Respondents complied with the Discovery Orders nor gave to the Petitioners any discovery material during this period of time. Petitioners did submit to each Respondent in August, a request for documents from five (5) additional Partnerships from each group of Respondents. (Def. App. p. 366-374) The Respondents jointly filed a Protective Order claiming that Judge Noce only provided for a total of five (5) Partnerships. (Def. App. p. 362) The Petitioners filed a Motion to Compel which was *sustained* by the District Judge but not until *November 8, 1985.* In said order the District Judge noted, that "*discovery was at a minimum*". (App. D, p. A-21)

Petitioners then requested a continuance on *October 23, 1985* (Def. App. 2000) and again on *December 10, 1985* (Def. App. p. 729) due to the failure of Respondents to comply with discovery requests. There were seventeen (17) discovery motions and motions relating to dismissal of the RICO count pending before the District Judge. (App. D, p. A-23 - 24) Both requests were denied on November 4, 1985 and December 19, 1985 respectively. (Def. App. 2001, 789)

Petitioners again filed a request for Continuance on *December 27, 1985* after Lead Counsel, David G. Lupo, had

collapsed on *December 18, 1985,* was hospitalized and unable to continue with the trial. (Def. App. p. 810) This was denied on *January 2, 1986.* (Def. App. 827) Petitioners filed a Writ of Mandamus, (No. 86-1032) on *January 9, 1986* with the Court of Appeals seeking to overturn said order. (Def. App. 896)

Attorney Stemmler was directed to continue on the case even though he filed an Affidavit that he was not competent to try a security - RICO case, that he was unfamiliar with the case, the legal theories and documentary evidence and that he had never discussed the merits of the case with the clients regarding their individual claims or testimony. (Def. App. 814)

Petitioner Kickham individually and by his personal Attorney, requested a Continuance on *January 16, 1986* which was denied on *January 16, 1986.* (Def. App. 927)

Petitioners' Attorneys then requested Leave to Withdraw on *January 16, 1986* and this was denied on *January 26, 1986.* (Def. App. p. 934, 938) Petitioners' filed a Writ of Mandamus, (No. 86-1096) with the Court of Appeals to overturn said ruling. (Dep. App. 939)

Attorney Stemmler was directed to proceed with the accelerated deposition schedule before a Special Commissioner appointed by the District Judge with depositions to commence on *January 22, 1986,* in St. Louis, then New York, and California. On January 6, 1986, Petitioners requested the right to take the depositions of sixty-one (61) persons. (App. D, p. A-25 - 27) This was denied and limited to approximately fifteen witnesses by the Special Commissioner because of the discovery cut-off date. (Def. App. 963) The discovery cutoff date was extended to *February 19, 1986.* However, Attorney Stemmler was permitted to take the deposition of an employee of the United States Patent Office in Washington, D.C. on February 21, 1986. A total of thirty-four (34) depositions were taken during this period. (App. D, p. A-28 - 29)

On *February 24, 1986,* Petitioners filed another request for Continuance based upon the grounds that certain non-party

witnesses and Respondent Preston had failed to appear after service and due notice of deposition in New York, and Los Angeles, and that the overall time allowed for *discovery was inadequate for proper preparation.* (Def. App. p. 1008) The District Court denied the request on *March 10, 1986.* (Def. App. p. 1086)

Petitioners then filed a Supplemental Pleading to their Writs of Mandamus, (No. 86-1032; No. 86-1096) on *March 4, 1986.* The Court of Appeals did not rule until *March 18, 1986,* one (1) day after the jury trial started on *March 17, 1986.* The order denied the Writs *but without prejudice;* Petitioners were directed to raise the issue on Appeal after a final judgment. (App. D, p. A-30)

On February 13, 1986, Petitioners had requested the right to subpoena fifty-eight (58) witnesses (including party-defendants) outside the 100 mile limit under *18 U.S.C. 1965(c)(d).* (Def. App. 939) This was denied by the District Judge on *three* (3) separate occasions. (Def. App. 997, 1004, 1032)

Petitioner had requested the right to retain expert witnesses after depositions were completed on February 19, 1986. (Def. App. 1001) This request was denied by the Magistrate and District Judge (Def. App. p. 1027, 1030)

Petitioners' were required to respond to Respondents' Motions for Summary Judgments filed *March 4, 1986* as well as the Pre-trial compliance order of the District Court due within ten (10) days before trial. (Def. App. 1350) (Def. App. 736) The District Judge *denied* Respondents' Motions for Summary Judgment by his order of *March 13, 1986* and directed that the case will proceed to trial, commencing *March 17, 1986.* (App. A, p. A-31, 33). On *March 17, 1986* the District Judge orally set aside his order of *March 13, 1986* and permitted Respondents to orally resubmit their motions for Summary Judgment. Petitioners were given three (3) days to submit evidence to overcome the motions. (T. I p. 2-3) The jury was excused after *March 20, 1986* and Petitioners were given until *March 27, 1986* to respond

to the Summary Judgment Motions. (Def. App. 1329) On *March 31, 1986* the District Judge sustained the Respondents' Motions for Summary Judgments (T. IV p. 19) and the Appellate Court upheld that Ruling in its order of March 25, 1987.

REASONS FOR GRANTING THE PETITION

This case presents several issues of significant importance which have not been directly addressed by this Court and which have a direct bearing on all litigants and Attorneys for litigants appearing before the Federal District Courts.

QUESTIONS I AND II

Will litigants and their Attorneys be given the traditional due process safeguards of adequate Notice and hearing on the record before sanctions and fines are imposed, whether under Federal Rules of Civil Procedure *37(b),* under *Rule 11,* under *Rule 42(b)* of the Federal Rules of Crim. Proc. and *18 U.S.C. 401* for contempt of Court, under the Courts' "inherent power to levy sanctions in response to abusive litigation tactics," or under *28 U.S.C. 1927,* as amended in 1980. Is "Bad Faith" a necessary prerequisite as expressed by this Court in *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 766-67, 100 S.Ct. 2455, 2464-5, 65 L.Ed.2d 488 (1980).

Is there a different test or standard which the District Court should apply depending upon which Rule or circumstance is made applicably? How shall the District Courts know which category shall be applied to impose sanctions or fines? Is there a *difference* between sanctions, such as paying opposing parties' Attorney's fees, and *fines,* such as imposing the entire cost of a Special Commissioner to preside over deposition onto the Attorneys for one of the parties; all without Notice and hearing on the record? What recourse do Petitioners have when the Court of Appeals fails to review timely objections by Writ of Mandamus and then there is a failure of the Court of Appeals to address the issues when presented on appeal? The Seventh and Ninth Circuit concluded that *Section 28 U.S.C. 1927,* as amend-

ed, now requires a showing that Counsel acted with *bad faith* before Attorney fees can be imposed. *Suslick v. Rothschild Securities Corp.*, 741 F.2d 1000, 1006 (7th Cir. 1984); *United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983).

Contrary wise is the Fifth Circuit (5th Cir.) which held that *Sec. 1927* sets a lower threshold at which misbehavior would be punished. *Lewis v. Brown & Root Inc.*, 711 F.2d 1287, 1292 (5th Cir. 1983). The Sixth Circuit (6th Cir.) also held that *Sec. 1927* does not have a bad faith requirement for the assessment of Attorney fees. *Jones v. Continental Corp.*, 789 F.2d 1225, 1230 (6th Cir. 1986). Thus, the Courts of Appeals are in conflict.

The tradition as to due process concerns for Notice and the opportunity for a hearing on the record before sanctions are imposed has been recognized as a prerequisite for the imposition of sanctions and the Court of Appeals failed in its responsibility as a "review Court" when it made no independent judgment as to Petitioners' and Petitioners' Counsels' due process rights under the Fifth Amendment when the District Court, on two (2) separate occasions, imposed sanctions. The Second Sanction could more accurately be characterized as a "fine" for criminal contempt! (Rule 42(b), Fed. Rules of Crim. Proc. and 18 U.S.C. 401). Petitioners' Motion for Protective order and right to a 72(a) Appeal was ignored as to one sanction, as well as Petitioners' Counsels' right to notice and hearing in both instances. *Rule 37(b), Rule 11,* and *Rule 59(d) & (e)* were violated as well as *28 U.S.C. 1927* as Amended in 1980. Petitioners and Petitioners' Counsels filed a *Writ of Mandamus on January 6, 1986 with the United States Court of Appeals* requesting relief. (No. 86-1016) (Def. App. 844) On March 18, 1986 said Court denied the Writ *without prejudice* to Petitioners' right tc raise the *same issues on appeal from a final judgment.* (App. D, p. A-30) However, although Petitioners *again raised the issues of said sanctions on appeal after final judgment and on Motion for Rehearing en banc,* the Court of Appeals *failed* in its reviewing function to address the issues in its three (3) page unpublished

opinion of *March 25, 2987* and in its *May 11, 1987* order denying Plaintiffs' Motion for Rehearing en banc. (App. B, p. A-2 - 4; App. A, p. A-1)

As stated by this Court in *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 766 (1980) "Like other sanctions, Attorney fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record."

The issue of sanctions was raised in Petitioners' brief, Point of Error Number 5 as set forth in Petitioners' Appendix D on page A-34 - 36.

SANCTION NO. 1

1. The Magistrate's order of *January 26, 1984* directed that any *future depositions* shall await further Court orders and the disposition of the *documentary requests* should be decided first before *depositions* could be taken. (Def. App. 299, 303) Said order was sustained by District Judge Cahill on a Rule 72(a) appeal on *June 28, 1984.* (Def. App. 358) The Magistrate's order and Judge Cahill's order were all *adopted* by District Judge Gunn in his order of *September 3, 1985.* (Def. App. 390)

a) On *November 6, 1985* and *November 12, 1985,* the Defendants filed Notices to take approximately twelve (12) depositions of Petitioners and other non-party witnesses to commence *November 14, 1985,* all after the District Judge, on *November 4, 1985,* had denied Petitioners' First Motion for Continuance of the *March 17, 1986* trial date. Pending before the District Judge were seventeen (17) discovery Motions. (App. D, p. A-23 - 24)

b) Petitioners' Attorney, on *November 12, 1985,* upon receipt of said Notices, requested a modification of the dates for certain Petitioners. Petitioners' Attorney raised the issue of the *prior orders* and that discovery motions relating to document discovery were still *pending* before the Court. Respondents' Attorneys refused to modify the dates or grant any continuance of the dates. Petitioners filed their Motions for a protective Order on *November 12, 1985.* (Def. App. p. 570, 576, 584) They also

filed suggestions as to alternative dates and Motion for Discovery Conference. (Def. App. 584, 587)

c) Petitioners' Attorney, Stemmler, by telephone, gave Notice to Respondents' Counsels on *November 13, 1985* to appear before the District Judge at 9:00 a.m. on *November 14, 1985* to establish a discovery schedule and hearing on Petitioners' Protective Order. Counsels for the Respondents were already present when Petitioners' Counsel, Stemmler, arrived a few minutes after 9:00 a.m. At such time, he was told by Respondents' Counsels that they had already talked to the District Judge, that there was nothing on the docket and that the District Judge had left to appear as a Special Judge sitting on the United States Court of Appeals for the Eighth Circuit.

d) Petitioners' Counsel, Stemmler, gave another Notice on November 18, 1985 to have a hearing on November 20, 1985 at 9:00 a.m. (Def. App. 601) However, on November 18, 1985, said District Judge directed that all discovery matters be brought before Magistrate Kingsland. The Respondents, on *November 20, 1985,* filed a Joint Motion for Sanctions and Attorney fees against the Petitioners for failure to appear at the November 14-15, 1985 Depositions and for Respondents' Counsels appearance at the District Judge's Courtroom on November 14, 1985.

Respondents' Motions for sanctions were never received by Petitioners' Counsel nor were Petitioners given advance notice that on *November 26, 1985,* the Magistrate would take up Respondents' Motion for Sanctions. Furthermore, there was *no mention at all at the November 22, 1985 hearing* that a motion was filed or that it would be on the agenda for the November 26, 1985 hearing. Petitioners' Counsel, Lupo, appeared at the hearing prepared to argue the various discovery Motions pending. (Transcript of November 26, 1985 proceeding, p. 3-4, Def. App. Vol. XVIII) When given a copy of the agenda it was noted that Respondents' Motion for Sanctions was the first order before the Court. Petitioners' Counsel advised the Court that a copy of the Motion for Sanctions had not

been received. (Transcript of November 26, 1985 proceeding, p. 3-4, Def. App. Vol. XVIII) The Magistrate directed Respondents to hand Petitioners' Counsel a copy and directed that the parties argue the Motion at that time. (Transcript of November 26, 1985 proceeding, p. 3-4, Def. App. Vol. XVIII)

e) Judge Kingsland did not provide the Petitioners *notice* and an opportunity for a hearing regarding said sanctions, nor did he take up the Petitioners' Motion for a Protective Order or the request for a discovery conference. On *November 27, 1985,* he ordered sanctions against the Petitioners but waited until December 10, 1985 to order the amount of the sanctions in the Sum of *Two Thousand Twenty-Five Dollars and Seventy-Five Cents* ($2,025.75). (App. D, p. A-37 - 38; Def. App. 782) The Magistrate further ordered Petitioners' Counsels to conduct additional Local Rule 7(c) conferences within a six (6) day period and submit results by letter to the Court. (Def. App. 609-11)

f) Petitioners appealed said Order of Sanctions under Federal Rule 72(a) which order was sustained by the District Judge by his order of *December 19, 1985.* (Def. App. 641, 789) The District Court Judge, in his order, assumed that the Protective orders were taken into consideration by the Magistrate and thus the matter was moot. (Def. App. 789) *This was a failure to review under Rule 72(a) by the District Judge.*

g) Petitioners' Counsels due process rights were violated and *Federal Rule 59(d) & (e)* was violated when the District Judge, on *May 27, 1986,* well after final judgment of *March 31, 1986,* amended his *December 19, 1985* order and directed *Petitioner's Counsels* to pay the sanctions. (App. D, p. A-40 - 41) The District Judge ignored his order of May 8, 1986, and incorrectly stated that the Magistrate, on December 19, 1985, imposed Sanctions in both instances upon Petitioners' Counsels. Said order of *December 19, 1985* had become final ten (10) days after final judgment. There never was a hearing to determine if there was "bad faith" or unreasonable and vexatious acts by Peti-

tioners or Petitioners' Counsels. *Roadway Express, Inc. v. Piper, supra* at 706-67; *28 U.S.C. 1927, as amended.*

The District Court and the Court of Appeals, by not reviewing the *due process* procedures of the Magistrate and the District Court and by not affording Petitioners and Attorneys for Petitioners notice and an opportunity to respond and a hearing prior to the disposition of sanctions, have violated the Fifth Amendment right of Petitioners and Petitioners' Counsel. *Glass v. Pfeffer,* 657 F.2d 252, 257-8 (10th Cir. 1981); *Miranda v. Southern Pacific Transportation Co.,* 710 F.2d 516, 522-523 (9th Cir. 1983); *Donaldson v. Clark,* 786 F.2d 1570, 1577 (11th Cir. 1986) (a *fine* was imposed upon an Attorney and considered in the nature of a *criminal contempt* requiring due notice and a hearing; *Textor v. Board of Registor of Northern Illinois University,* 711 F.2d 1387, 1395-1396 (7th Cir. 1983) (Attorney fees imposed without a hearing and improperly *shifted* the burden of proof to the sanctioned Attorneys in a subsequent hearing where sanctions are considered in the nature of a criminal contempt as in *Donaldson, supra)*

There was no evidence of bad faith or unreasonable and vexatious acts by Petitioners' Counsels in calling for a hearing on the Protective Order and request for Discovery Conference.

There had not been any prior violations nor any expression of intent not to comply with the Court's orders.

SANCTION NO. 2

On *December 16, 1985,* the deposition of Petitioner Arla Reed was commenced in accordance with the *accelerated discovery schedule* ordered by Magistrate Kingsland. (App. D, p. A-42 - 43) Lead Counsel, David G. Lupo, had to appear for a trial call docket in another matter. The Magistrate would not continue the deposition and Attorney James Stemmler represented Petitioner Reed.

Near the end of the deposition, Respondents asked Petitioner Reed to state the "facts" as related to him by his Counsel to

support his claims. Petitioners' Attorney raised the objection as to a violation of Privileged Communication and Work Product. Respondents did not seek relief from the Magistrate to Compel answers by Petitioner Reed. (Depo. of Petitioner Reed, p. 186-188))

On *December 17, 1985,* Petitioner Burt's deposition was taken. After several hours of deposition, Respondents sought to have Dr. Burt state "facts" supporting his claim as *related to him by his Attorney.* Petitioners' Counsel, David G. Lupo, raised the issue of *Privileged Communication and Work Product.*

At 5:12 p.m., Petitioners' Counsel received *verbal* notice that Respondents' Counsel had arranged a conference before Magistrate Kingsland in *connection with the Petitioners' objections* the following morning at 10:30 a.m. on December 18, 1985. (Depo. of Petitioner Burt, p. 283-286)

The Petitioners' Counsel requested that the Court Reporter have a complete transcript prepared at that time so that the Magistrate would have a complete record. (Depo. of Petitioner Burt, p. 286-288)

When Petitioners' Counsel arrived at Magistrate Kingsland's chambers, Respondents' Counsels were already present and Magistrate Kingsland did not have a complete transcript but only excerpts prepared by Respondents' Counsels.

Petitioners' Counsel, Lupo, filed a Protective Order under Rule 37(b) on *December 18, 1985,* prior to the conference and presented a copy to Magistrate Kingsland. (Def. App. 784)

A few minutes thereafter, Petitioners' Counsel, David G. Lupo, collapsed and was taken to the hospital, was in intensive care for four (4) days and not released until December 24, 1985. He was directed not to do anything for two (2) months and to not participate in any trials.

However, on *December 18, 1985,* Judge Kingsland apparently made a *verbal* order that a Special Commissioner be appointed

to preside over all depositions and all costs of the Special Commissioner be assessed against Petitioners' Counsels without reimbursement from the Petitioners.

There was no transcript of the *December 18, 1985* conference nor was Petitioners' Counsel *provided* with a copy of Respondents' *Motion for sanctions until he appeared at the Conference on December 18, 1985.*

Before Petitioners or Petitioners' Counsel were able to appeal under Rule 72(a), the District Judge on December 20, 1985 took it upon himself to issue an order sustaining Judge Kingsland's *verbal orders.* (App. D, p. A-44 - 45) *Petitioners' Counsels were denied proper notice, a hearing and their right to a Rule 72(a) Appeal before an independent judicial body.* The order was in effect a "fine" imposed for Criminal contempt. *Petitioners' Counsels were not afforded the due process protection of Rule 42(b) Fed.R.Crim.Proc. and 18 U.S.C. 401.*

Petitioners and Petitioners' Counsel jointly filed a Writ of Mandamus in the United States Court of Appeals on *January 6, 1986* (86-1016). (Def. App. 844)

The Court of Appeals did not rule upon the matter until well after the *accelerated deposition schedule. The Special Commissioner had participated in Thirty-Four (34) depositions in St. Louis, New York and Los Angeles.* (App. D, p. A-28 - 29) On *March 18, 1986,* the Court of Appeals denied the Writ of Mandamus, *without prejudice,* but directed that Petitioners *could raise these issues on Appeal after a final judgment.*

On *March 12, 1986,* the District Judge amended his order by shifting the *$10,338.72* cost of the Special Commissioner to the *Petitioners* personally! (Def. App. 2014) *There was no Notice or hearing given to the Petitioners!*

On *May 8, 1986,* after Petitioners' Counsel requested a Stay on behalf of Petitioners to make payment pending appeal from the *March 31, 1986* order. The District Judge amended his *March 12, 1986* order and *shifted* the total cost back to the Peti-

tioners' Counsels. (App. D, p. A-46 - 47) Again, *no Notice or hearing!* The District Court had no jurisdiction to amend his order after more than ten (10) days after final judgment. Rule 59(d) & (e).

The Court of Appeals did not address the issue of sanctions or the issue of due process procedures of the District Court in their opinion of *March 25, 1987* nor in the order denying Petitioners' Motion for Rehearing en banc.

The District Judge never cited under what Rule or statute Petitioners or Attorney for Petitioners were being fined or assessed. *Rule 37(b), Rule 11, Rule 72(a)* and *28 U.S.C. 1927,* as amended, were also violated.

There was no evidence of "bad faith" or unreasonable and vexatious acts by Petitioners' Counsel. *Roadway Express, Inc. v. Piper, supra* at 2464-2465; *Glass v. Pfeffer, supra* at 257-258; *Rule 42(b), Fed.R.Crim.Proc.; 18 U.S.C. 401; 28 U.S.C. 1927,* as amended.

What is meant by "Facts" as related by an Attorney to his client is not clear and when cumulated may also reveal the *opinion work product of Counsel. Sporck v. Peil,* 759 F.2d 312, 316 (3rd Cir. 1985); *Hickman v. Taylor,* 329 U.S. 495, 505-514 (1947). Opinion work product is accorded an almost absolute protection from discovery. *Sporck v. Peil, supra* at 316; *In Re Murphy,* 560 F.2d 326, 336 (8th Cir. 1977).

This very issue was raised in and ruled upon by the Eighth Circuit Court of Appeals in the case of Shelton v. American Motors Corporation, 805 F.2d 1323, 1329-1330 (8th Cir. 1986). It supports Petitioners position.

The Special Commissioner originally agreed with the argument of Petitioners' Counsel but stated he was bound by the order of the District Court. (Depo. of Petitioner Bastien, p. 4-9; Depo. of Petitioner Yager, p. 81-89)

Can objections as to Privileged Communications and violation of opinion work product be considered unreasonable or

vexatious behavior by Counsel? Can objections as to Privileged Communications and violation of work product be considered a criminal contempt? Petitioners' Attorney had a duty to raise the issue of Privileged Communications or Work Product violation. *International Union of Elec. Radio and Mach. Workers v. Westinghouse Elec. Corp.*, 91 F.R.D. 277, 279 (D.C. Cir. 1981); *Perrington v. Bergen Brunswig*, 77 F.R.D. 455, 460-461 (N.D. Cal. 1978). Otherwise, there would be a waiver thereof.

This Court should issue its Writ of Certiorari so that the District Courts, the Courts of Appeals, Litigants and attorneys for Litigants may have a standard to more clearly determine the requisite showing needed for the District Courts to impose sanctions and fines.

QUESTIONS III & IV

This is not only a complex case, but District Judge Cahill declared it was one of the *most complex cases* in the District (July 19, 1984 Hearing Transcript p. 21, 26; Def. App. Vol. XVIII). There were discovery motions still pending before the Magistrate when the accelerated deposition schedule was first ordered by the Magistrate commencing December 11, 1985 (App. D, p. A-92 - 93) and then by the Special Commissioner, which commenced on January 22, 1986. (App. D, p. A-28 - 29)

The Court did not permit Petitioners the benefit of Rule 56(f) and refused Petitioners the right to subpoena witnesses and parties for the jury trial commencing *March 17, 1986* contrary to *18 U.S.C. 1965 (c) & (d)* and refused Petitioners the use of expert witnesses after the depositions were completed on February 21, 1986.

Although Petitioners requested to take the depositions of sixty-one (61) witnesses and parties, the Special Commissioner refused Petitioners' request.

There were discovery motions pending when the District Court overruled Respondents' Summary Judgment motions on *March 13, 1986.* (February 28, 1986, Motion filed to Require

Ruling on Certain Motions Pending before Magistrate Kingsland and Not Ruled Upon. Denied on March 10, 1986, Def. App. 1086)

There were discovery motions pending when the District Court called the parties to trial on *March 17, 1986.* (T. I. 132-135)

The Court of Appeals, Eighth Circuit, by affirming the District Court's grant of Respondents' Motions for Summary Judgment on *March 31, 1986* failed to follow this Court's ruling in *Celotex Corporation v. Catrett,* 106 S.Ct. 2548, 2552-2553 (1986), relating to when motions for Summary Judgment should be granted.

Contrary to this Court's ruling in *Celotex,* the District Court "railroaded" Petitioners through an accelerated discovery schedule commencing in *December 1985* and further accelerated on January 22, 1986 through February 21, 1986.

The Petitioners sought protection from the accelerated deposition schedule by filing their Writ of Mandamus, Cause No. 1032, on *January 9, 1986.* (Def. App. p. 844)

Petitioners' lead counsel's illness on *December 18, 1985* and his inability to participate in the trial, along with attorney Stemmler's affidavit to the Court that he was not competent to proceed in the case, prompted attorney David Lupo and attorney James Stemmler to seek leave to withdraw as attorneys for Petitioners. (Def. App. p. 934) This was denied by the District Court on *January 17, 1986.* (Def. App. p. 938)

Relief from this order was sought by way of a Writ of Mandamus to the Court of Appeals, Cause 86-1096 (Def. App. 939) and by a Supplemental Writ filed on March 6, 1986. The Court of Appeals, en banc, did not rule on Petitioners' request for relief and thus attorney Stemmler was required to participate in the accelerated deposition schedule commencing on *January 22, 1986* in St. Louis, then New York, Los Angeles and Washington, D.C. ending on February 21, 1986. The Court of

Appeals did not rule on both Petitioners' Writs of Mandamus until *March 18, 1986,* one day after the jury trial started on *March 17, 1986.* It denied the Writs of Mandamus but *without prejudice* and directed that the Petitioners could seek relief on appeal after a final judgment. (App. D, p. A-30)

However, the Court of Appeals failed to directly address the issue of discovery or Petitioners' request for continuances in its *March 25, 1987 opinion.* It thereby ignored its reviewing function of the District Courts action and thereby failed to determine the underlying and necessary elements of a Summary Judgment prior to decision. It ignored this Courts' ruling in *Celotex Corp. v. Catrett, supra,* and in *White Motor Co. v. United States,* 372 U.S. 253, 264, 283 f.n. 2 (1963) (Record not sufficiently developed to allow Court to make a fully informed decision in a difficult and far-reaching issue and thus a trial and not Summary Judgment is usually required) Nor did it follow its own prior decisions. *Roberts v. Browning,* 610 F.2d 528, 536-537 (8th Cir. 1979) (Record incomplete and Party should be given opportunity to develop the record, through a trial if necessary); *Dace v. A.C.F. Industries, Inc.,* 722 F.2d 374, 375-377, 379 (8th Cir. 1983)

The Court of Appeals erroneously made *a new finding* in its *March 25, 1987* opinion. It made an erroneous finding that there were four (4) years of discovery (App. B, p. A-4) However, *not even the District Judge made such a finding!* The District Court noted in its *March 3, 1986 Order* that Petitioners had only limited discovery within the *four (4) months prior to trial.* As early as *November 8, 1985,* the District Court declared and found that there had been only "minimal discovery." (App. D, p. A-21)

The District Judge in his opinion of *April 17, 1986,* even admitted that on July 31, 1985, that it was *pushing the cause to trial!* (App. C, p. A-11) Such discrepancy in statements by the Court of Appeals and the District Court exemplifies the *failure* of the Court of Appeals to *adequately satisfy* its reviewing function.

Discovery was never completed and counsel for Petitioners objected up to the day of trial, at depositions and by affidavit and throughout trial that they were not prepared for trial! (Def. App. p. 956, 1947; Def. App. Vol. XII, p. 1947 (5-7, 37-40, 124-127, 135-136)) (T. I p. 6, 9-15; T. II, p. 1, 3-5) The District Judge stated in his memorandum opinion of *April 17, 1986* that as of *July 31, 1985* the case was still in the *early stages* of preparation *after three (3) years of trial.* (App. C, p. A-11) The Court also states in the opinion that during the "*intensive schedule*" involving daily depositions from *January 22, 1986* through February 21, 1986, "problems persisted and *plaintiffs protested* that the schedule would not permit them proper preparation." (App. C, p. A-12) The District Court in its *March 13, 1986* order, *denying* Respondents' motion for Summary Judgment, also stated discovery was *forced* to conclusion on *February 19, 1986.* (App. D, p. A-32) Nevertheless, the District Court *refused to continue the case!*

What the District Court and the Court of Appeals failed to mention is that the *Respondents were given the right* from *January 22, 1986 to February 3, 1986* to take depositions of Petitioners and other non-party witnesses in St. Louis. Also Respondents took depositions on the 6th and 7th of February. Petitioners had *only one day, February 5, 1986* to take three (3) depositions in St. Louis. (App. D, p. A-32) Petitioners had given notice to the Special Commissioner, appointed to preside over the depositions, that they wanted to take sixty-one (61) depositions in St. Louis, New York, Los Angeles and Washington, D.C. (App. D, p. A-25 - 27)

Petitioners were permitted to take depositions in New York, commencing *February 10, 1986* of nine (9) defendants, one (1) distributor and one other witness in *just four (4) days.* (App. D, p. A-28 - 29)

The Special Commissioner even stated on the record that it would be impossible to take complete depositions of the Respondent attorneys in two (2) days allowed by the schedule. (Depo. of Polla Harris-Moore, p. 59)

The depositions were continued in Los Angeles and were scheduled to start on February 17, 1985. Since it was a legal holiday, several witnesses subpoenaed by Petitioners refused to appear. Respondent Preston, duly subpoenaed, was scheduled on February 18, 1986 and did not appear. Petitioners were thus limited to two (2) depositions on *February 18, 1986* and two (2) depositions on *February 19, 1986.* The discovery deadline ended on *February 19, 1986.*

Petitioners requested a continuance on *February 24, 1986,* due to the failure of subpoenaed witnesses to appear for deposition and lack of time to take depositions of other witnesses, but this was denied on *March 3, 1986.* (Def. App. p. 1008, 1043)

As pointed out in Petitioners' Supplemental Petition to their Writ of Mandamus pending in the Court of Appeals filed on *March 4, 1986,* "the order of discovery was and is a charade".

The District Judge, in his *March 13, 1986* order, denying Respondents' Motions for Summary Judgment, stated that there were "genuine issues as to material facts," and thus, Summary Judgment was an inappropriate remedy. (App. D, p. A-33)

The Court also found: a) that the Defendants filed their motions past the deadline prescribed by Court Rule 7(h); b) that Petitioners *burdened with trial preparation* have scarcely had an *adequate amount of time to respond,* and for that reason alone, the Court finds denial of Defendants motion appropriate; and c) that the Petitioners' case will be tried in its entirety and they will be provided the opportunity to present their *complete* case to the jury in a single trial to commence as scheduled seven months ago. (App. D, p. A-33)

After inquiring whether or not the case could be settled for $165,000.00 offered by the Respondents, the Court on *March 17, 1986,* orally set aside his *March 13, 1986 order* and allowed the Respondents to orally resubmit their Motions for Summary Judgment. (T. I. p. 2-3) Petitioners were, in effect, sandbagged! *At no time was the District Judge's oral order ever reduced*

to written order! The Petitioners were not afforded the opportunity to present all their evidence. The District Judge gave Petitioners until *March 20, 1986* to submit all their evidence to overcome Respondents' oral Motions for Summary Judgment. Petitioners raised these matters in their briefs before the Court of Appeals in the first two (2) points of error as set forth in Petitioners Appendix D on page 48-49.

IV

Instead of determining the existence of numerous and complex genuine issues of material fact, the District Judge and Court of Appeals violated due process rights of Petitioners by making findings of fact adverse to Petitioners as to disputed evidence and findings of facts adverse to Petitioners when there was no dispute in the evidence submitted by Petitioners. For illustrative purposes, reference is made to the District Court's *April 17, 1986* opinion.

a

1. Page 2: Plaintiffs were, through offering memorandum, made available to them *prior* to the time of their investment, counselled to purchase limited partnership interests only if they could afford a total loss of their investment. (App. C, p. A-6)

a) Six (6) of the Petitioners testified that they did not receive the offering memorandum prior to the time of the purchase. (See Statement of Facts p. 3)

2. Page 2: ...and the chief return anticipated by the plaintiffs-investors was a substantial tax benefit. (App. C, p. A-6)

a) All Petitioners testified that they anticipated profits from their investment after three to five (3-5) years. (Depo. and Interr. of Petitioners.

3. Page 2: Prior to purchasing interests in the limited partnerships at issue, plaintiffs were required to complete an "investor's questionnaire." (App. C, p. A-7)

a) Petitioner Kickham, Bastien, O'Hare, Tschudy, Werner, and Burt completed their questionnaires on the day they invested or shortly thereafter. (Depo. of Petitioner Kickham, Vol. I, p. 61-62; of Petitioner Bastien, p. 56-57; of Petitioner Burt, Vol. II, p. 11, Vol. I, p. 45; Interrogatories of Petitioner O'Hare, Def. App. p. 177; of Petitioner Tschudy, p. 188; of Petitioner Werner, Jr., p. 200; of Petitioner Burt, p. 154; Depo. of Petitioner Reed, p. 34-35)

4. Page 2: Upon completion of this questionnaire, each Petitioner received a confidential offering memorandum covering the partnership. (App. C, p. A-7)

a) Six (6) of eight (8) Petitioners testified that they did not receive the offering memorandum prior to the time of the purchase. (See cite to Item 1 above)

5. Page 3: Plaintiffs realized that their investment in the partnership at issue in this case would not shelter their income. (App. C, p. A-8)

a) The general partners were informing the investors that the 1976 Tax Reform Act would not be retroactive. (Add. p. 7-10).

b) The general partners wrote the investors and stated that the Internal Revenue Service was wrong and inducing them to pay retainer fees to Respondent-attorney Schwartzman to represent them. (Add. p. 11-12, 42-43).

c) Petitioner O'Hara, Yager, Tschudy and Bastien were not in the "Cohen" partnerships and never received any notice of the change in the law from anyone.

d) It was in 1978 that most of the Petitioners received notice of a possible audit, but the audit did not take place until several years later. O'Hara and Bastien were the first Petitioners to have an assessment made in *1980.* They both appealed the assessment administratively through the Internal Revenue Service in 1980. (Depo. of Petitioner O'Hara and Bastien, p. 47, 103-104) (Dr. Burt never was audited)

6. Page 5: Plaintiffs stood by their broader allegation of a national fraudulent scheme involving many more parties than had been named in the original suit, whose identities would only become clear in the course of discovery. (App. C, p. A-10)

a) Inaccurate characterizations of pleading — there was never a finding that the motions to declare "complex litigations" was to shield Petitioners from their obligation of revealing theory of their case "prematurely."

b) The September 14, 1983 order, page 13, stated that it was premature for Petitioners to answer but they could not withhold information a day or two before trial. *All Respondents had also filed protective orders at the same time.*

7. Page 6: Plaintiffs persisted in efforts to discover documents beyond the scope of Magistrates order. (App. C, p. A-10)

a) No evidence of such an accusation.

b) The Petitioners were required to seek Motions to Compel in August 1985 when Respondents refused to submit documents of five (5) additional partnerships as ordered by the Magistrate and the District Court. On *November 8, 1985,* the District Judge sustained Petitioners' motion to compel but *refused* to sanction Respondents. (App. D, p. A-20 - 21) *This is the only discovery order made by the District Judge or Magistrate* prior to the January 21, 1986 accelerated deposition schedule!

8. Page 6: Defendants insisted that Plaintiffs submit discovery request to reveal facts upon which their claims were based. (App. C, p. A-10)

a) There were no motions pending by Respondents directed against Petitioners to produce evidence or "facts" when this District Judge received assignment of this case in July 1985. Nor did Respondents seek any information by interrogatories or document request after July, 1985.

9. Page 7: A new flurry of discovery motions was forthcoming, threatening to reduce litigation yet again to a battle of unproductive motion papers. (App. C, p. A-11)

a) See Page 6 of opinion — *"all document production to be completed by August 31, 1985."* Respondents failed to produce any documents by *August 31, 1985.* In fact, the Court did not issue the order of the *July 31, 1985* conference until *September 3, 1985.* The Respondents made no *move to comply!* Were they sanctioned? No! They were rewarded instead!

b) Petitioners were forced to file motions to compel and these motions *were still pending before the Magistrate Court on March 17, 1986!* They are still pending! (T. I, p. 132-136)

10. Page 5: Foreshadowing a three year battle over scope and priority of discovery. (App. C, p. A-10)

a) What is omitted is that Petitioners filed leave to amend their complaint to add a RICO count on *February 17, 1984!* The case was held in abeyance by order of Judge Cahill and there was no discovery until after *September 3, 1985.* Who was prejudiced? The Petitioners or the Respondents?

The moving party must show that there is an absence of evidence to support the non-moving Party's case.

Nothing is alleged by Respondents in their Motions for Summary Judgment to refute the *numerous omissions of material facts* as submitted by Petitioners. Nothing is said in the District Judge's opinion as to *"omissions."* He merely states that *Affiliated Ute,* is not extended to cases in which "omissions" are set out in a document. How can there be "omissions" set out in a document? The District Court ignores Petitioners' 10b-5(1) & (3) claims and structured his opinion of April 17, 1986 upon "reliance" by Petitioners upon the prospectus and thus a 10b-5(2) claim only. *Affiliated Ute Citizens v. U.S.,* 406 U.S. 128, 152-154 (1972); *Shores, Jr. v. Sklar,* 647 F.2d 462, 460-472 (5th Cir. 1981); *Harris v. Union Electric Company,* 787 F.2d 355, 366-367 f.n. 9 (8th Cir. 1986); *Blackie v. Barrach,* 524 F.2d

891, 906-907 (9th Cir.), *cert. denied,* 429 U.S. 816, 97 S.Ct. 57, 50 L.Ed.2d 75 (1975).

The District Court and the Court of Appeals ignored the fact that the Petitioners' case was primarily an "omissions case" and ignored all of the evidence showing an "association in fact" among all the Respondents, Pattern of Racketeering Activity involving over thirty-seven (37) limited partnerships as well as the continuity in their actions, and their relationship and evidence of Public offering rather than Private offering under the doctrine of integration. *Sedima S.P.R.L. v. Imrex Co. Inc.,* 105 S.Ct. 3292 (1985); *Affiliated Ute Citizens v. U.S., supra;* (Exception to Reliance) *Blackie v. Barrach, supra;* (Fraud on the Market Place) *Harris v. Union Electric Co., supra;* (Fraud on the Market Place) *Shores, Jr. v. Sklar, et al., supra;* (Fraud on the Market Place — Omissions — Exception to Reliance) *Securities and Exchange Commission v. Ralston Purina Co.,* 346 U.S. 119, 126, 73 S.Ct. 931, 97 L.Ed. 1494 (1953) (Burden of proof of private offering upon issuer); *S.E.C. v. Murphy,* 626 F.2d 633, 645 (9th Cir. 1980); *General Life of Missouri Inv. Co. v. Shamburger,* 546 F.2d 774, 782 (8th Cir. 1976) (factors in determining whether separate offering or an integrated offering); *S.E.C. v. Holschuh,* 694 F.2d 130, 134-138 (7th Cir. 1982) (Integration)

Respondents did not establish a non-existence of a genuine issue! *Adickes v. S. H. Kress and Company,* 398 U.S. 144, 158-159, 90 S.Ct. 1598, 1608-1609 (1970).

CONCLUSION

The petition for Writ of Certiorari should be granted. The District Judge has held an evidential hearing on July 30, 1987 as to Respondents claims under Rule 11 to assess Petitioners for over $800,000.00 in Attorney fees for filing a frivilous lawsuit. Thus a stay order by this Court should be issued to prevent any assessment.

Respectfully submitted,

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St. Louis, Missouri 63101
(314) 436-4130
Attorney for Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1519-EM

Jack D. Bastian, et al.,
Appellants,

vs.

R. Rowland and Company, a Missouri Corporation, et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

May 11, 1987

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, United States Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1519

Jack D. Bastien, Arthur F. O'Hare, Jane S. Tschudy, E. Louis Werner, Jr., Michael J. Kickham, Arla E. Reed, Thomas W. Yager and Ronald B. Burt,
Appellants,

v.

R. Rowland and Company, a Missouri Corporation, Joseph G. Wohl, Carol Wohl and David Weiss, Executors, Irwin M. Rosenthal, Jacob W. Heller, Herman Schwartzman, Leonard I. Weinstock, Marcel Shwergold and Elkan Abramowitz, Howard L. Mann, E. Cooke Rand, Howard S. Jacobs, R. Mitchell Mass, Edward Fingerman, Weiss Rosenthal, Heller & Schwartzman, a dissolved legal partnership, Laventhol & Horwath, an accounting partnership, Richard W. A. Davis, Richard W.A. Davis, as Trustee for Richard W.A. Davis, Inc., a dissolved Florida corporation, Harold Rand, Harold Rand, d/b/a Harold Rand & Company Public Relations, Joel Preston, Irving Cohen, d/b/a The Astor Group, Ltd., I.C.A. Productions, Inc. a dissolved New York corporation, Stanley Levine, Ted Shapiro, Ted Shapiro, d/b/a The Astor Group, Ltd., Raymond E. Rowland, Jr., Robert R. Rust,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: February 9, 1987
Filed: March 25, 1987

Before ROSS, BOWMAN, and MAGILL, Circuit Judges.

PER CURIAM.

Jack D. Bastien, et al. ("Bastien") appeal the district court's[1] order of summary judgment in favor of R. Rowland and Co., Inc., et al. ("Rowland") in this action for securities fraud, common law fraud, conversion, breach of fiduciary relationship and violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68 (1982 & Supp. II 1984). For reversal, Bastien asserts various errors in the district court's orders regarding discovery, the denial of a continuance and the entry of summary judgment.

The costs of this prolonged litigation have far exceeded the amount of investment capital which is its subject matter. In 1975 an 1976, Bastien purchased through R. Rowland and Co., Inc., a St. Louis securities broker, interests in five limited partnerships organized for the purpose of buying and distributing motion pictures. Prior to purchase, each investor was informed in writing that the securities were "high risk" investments, and that any potential tax benefits flowing from the investments were contingent upon the then-operative tax laws remaining in effect.

At the time of the sale of the limited partnership interests, federal tax law permitted investors in such partnerships to take deductions for depreciation and investment credit in excess of the amount of their investment. The Tax Reform Act of 1976 limited the allowable deduction for motion picture limited partnerships to the initial amount of investments, however. The change in the tax law meant that Bastien could not use the

[1] The Honorable George F. Gunn, United States District Judge for the Eastern District of Missouri.

limited partnership investment to shelter income as anticipated at the time of purchase and, because the motion pictures were not profitable, Bastien received no return of capital on the investment. More than six years later, in June 1982, Bastien filed suit in the district court.

After nearly four years of discovery, which culminated in the imposition of sanctions against Bastien's attorneys for obstructing discovery and the appointment of a special master to prevent further abuses, Rowland moved for summary judgment on March 4, 1986. On March 31, the district court granted these motions, reasoning that Bastien failed to produce any evidence of material misrepresentation or other wrongdoing by Rowland.

Summary judgment is proper

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). A moving party is clearly entitled to "judgment as a matter of law" against a party who, after adequate time for discovery, fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 106 S.Ct. 2548, 2552-3 (1986).

The district court carefully analyzed Bastien's evidentiary burdens for the causes of action in question. The lengthy record before us supports the district court's conclusion that Rowland is entitled to judgment as a matter of law. Bastien's remaining claims are without merit. Accordingly, we affirm the summary judgment of the court, based on its well-reasoned opinion. *See* 8th Cir. R. 14.

A true copy.

ATTEST:

CLERK, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-950C(6)

Jack D. Bastien, et al.,
Plaintiffs,

vs.

R. Rowland & Co., Inc., et al.
Defendants.

MEMORANDUM AND ORDER

IT IS HEREBY ORDERED that the motions of defendants for summary judgment be and are granted.

This Court granted summary judgment in favor of defendants on all counts of plaintiffs' complaint at the conclusion of a hearing held March 31, 1986 at 9:00 a.m. in open court. The Court files this memorandum to state the basis for its ruling from the bench.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs in this case are eight wealthy individuals. At various times in 1975 and 1976, they purchased through R. Rowland & Co., a St. Louis securities broker, limited partnership interests in five limited partnerships[1] organized for the purpose of buying

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[1] The five limited partnerships in which plaintiffs purchased interests are identified below, along with the amount invested by each plaintiff:

Jack D. Bastien	Antares Associates	$12,000	¼
Michael J. Kickham	Alpine Associates	$22,500	½
Arthur F. O'Hare	Antares Associates	$12,000	¼

and distributing motion pictures. Motion picture distribution is a high-risk enterprise, and for this reason plaintiffs were, through offering memoranda made available to them prior to the time of their investment, counselled to purchase limited partnership interests only if they could afford a total loss of their investment. *See* Offering Memorandum of Antares Associates,[2] submitted as Exhibit B to the motion of the Rowland defendants for summary judgment, p. ii.

Under the United States tax laws controlling at the time of plaintiffs' purchases, however, investment in motion picture limited partnerships was a recognized legal means of sheltering income from taxation. It was at that time possible for investors in these partnerships to take deductions greatly in excess of their actual investment in the partnerships, and the chief return anticipated by these plaintiff-investors was a substantial tax benefit.[3]

Arla E. Reed	Somerset Associates	$24,000	1
Jane E. Tschudy	Antares Associates	$12,000	¼
E. Louis Werner	Alpine Associates	$45,000	1
	Avalon Associatea	$30,000	1
Thomas W. Yager	Cypress Associates	$13,000	¼
Ronald B. Burt	Somerset Associates	$24,000	1

See Plaintiffs' Exhibit A attached to original complaint.

In addition to these five limited partnerships, the allegations in plaintiffs' complaint touched on numerous others organized by the same parties for the same purposes. The additional partnerships proved the source of extensive discovery disputes discussed more fully in the body of this memorandum.

[2] The offering memoranda of the five limited partnerships involved in this case are substantially similar. Hence the Court will refer throughout to the Antares memorandum in support of its judgment with respect to all five partnerships.

[3] It appears from the record, for example, that plaintiff Bastien took a deduction of $50,746 for his $12,500 investment while plaintiff Werner deducted $230,583 for his investment of $75,000.

Prior to purchasing interests in the limited partnerships at issue, plaintiffs were required to complete "Investor Questionnaires" representing that each had a net worth in excess of $200,000 and that some portion of the gross annual income of each was taxable at a rate of 50% or higher. *See* Investor Questionnaires, submitted as Exhibit A to the motion of the Rowland defendants for summary judgment. Upon completion of this questionnaire, each plaintiff received a confidential offering memorandum covering the partnership in which he or she was investing. These memoranda prominently identified the securities involved as "high risk" investments. The memoranda emphasized the potential tax advantages flowing from the investments but fully disclosed that the benefits were contingent upon the then-operative tax laws remaining in effect. The memoranda further disclosed that the United States Congress had given consideration to the elimination of tax shelter benefits for holders of motion picture limited partnership interests. *See* offering memorandum at 3-15; 39-55.

In 1976 Congress acted to eradicate the favorable tax treatment extended to these interests. The Tax Reform Act of 1976 limited the allowable deduction for motion picture limited partnerships to the amount an individual investor had actually placed "at risk" — that is, to the amount of each plaintiff's investment.

Plaintiff-investors in the Alpine and Somerset partnerships were notified of this change in September 1976 by letter from Irving Cohen, general partner of those two partnerships. *See* letters of Irving Cohen to plaintiffs Werner, Kickham and Reed, submitted as Exhibit A to the motion of defendant Cohen for summary judgment. Defendant Cohen particularly alerted plaintiffs to the retroactive effect of the legislation.

Plaintiffs in all cases claimed pre-1976 Reform Act deductions for 1975 and 1976 and in some cases for subsequent years. The Internal Revenue Service challenged the deductions taken

by plaintiffs and ultimately required them to pay back taxes and penalties for the deductions disallowed under the 1976 Act. The IRS permitted full deductions to cover plaintiffs' "at risk" investments. By 1978 all plaintiffs realized that their investments in the partnerships at issue in this case would not shelter their income. Additionally, the partnerships proved to be unprofitable. None of the movies owned by the partnerships enjoyed any kind of commercial success, and plaintiffs received no return on the capital they invested.

Plaintiffs filed suit in this Court on June 15, 1982.[4] In their original fifteen count complaint[5] plaintiffs alleged that defendants had defrauded them of their investment capital by organizing the limited partnerships in such a way that the partnerships would yield benefits to the general partners without returning a profit to the limited partner investors. Plaintiffs alleged, *inter alia,* that defendants effected the sale of the limited partnership interests by deliberately misrepresenting the tax beneifts to accrue to plaintiffs, knowing the partnerships were not valid tax shelters; that the offering memoranda contained material misrepresentations and omissions concerning the cost to the partnership of procuring the motion pictures and the method of payment for them; that defendant R. Rowland & Co. failed to perform due diligence with respect to the partnerships and failed to make full disclosure of the rate of commission it was receiving in its sales of limited partnership interests;

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[4] This case was originally assigned to Court 2. In January 1983 it was reassigned to Court C, whence, in June 1983, it was reassigned to Court 4. In May 1985 it was reassigned to Court 6. Along the way the case has been three times referred to United States Magistrates and has been the subject of three petitions to the Eighth Circuit for extraordinary relief.

[5] Plaintiffs' original complaint actually comprised only twelve counts, since Counts I-III consisted solely of factual allegations and did not contain a prayer of relief.

that the defendants were involved in a national interlocking scheme to defraud investors; and that all the partnerships, along with unnamed and unnumbered others, were part of a mammoth securities offering, organized as individual partnerships so as to circumvent the registration and disclosure requirements of the Securities Act of 1933. Plaintiffs' complaint ran against R. Rowland & Co.; the New York law firm of counsel in organizing the limited partnerships, Weiss, Rosenthal, Heller & Schwartzmann; the St. Louis accounting firm alleged to have reviewed partnership accounts, Laventhol & Horwath; the general partners of the five partnerships in which plaintiffs invested, Richard W.A. Davis, Harold Rand, Irving Cohen, Joel Preston and Ted Shapiro; and the original limited partner of two of the partnerships, Stanley Levine. The complaint sought recovery under Rule 10b-5 promulgated under the Securities Exchange Act of 1934, common law fraud, breach of fiduciary duty, conversion and the Missouri Uniform Securities Act.

All defendants filed motions to dismiss on the ground that plaintiffs' complaint was barred on each count by the applicable statute of limitations. On February 25, 1983, Judge Meredith denied defendants' motions with respect to all counts other than Count XV arising under the Missouri Uniform Securities Act. Because plaintiffs had alleged concealment of the fraud by defendants so as to toll the running of the statute of limitations,[6] which raised a factual issue to be assumed in favor of plaintiffs at that stage in the proceedings, the Court concluded that dismissal of the complaint was not appropriate. Since, however, the equitable tolling doctrine was not available to suspend the running of the statute of limitations on the Missouri securities law claim, the Court dismissed Count XV. *See* Order of Count C dated February 25, 1983. Defendants thereafter filed answers denying every allegation of wrongdoing in plaintiffs' complaint.

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[6] Judge Meredith found the limitations period applicable to plaintiffs' complaint to be two years on all surviving counts. *See* Order of Court C dated February 25, 1983.

The history of this case from the time it could be said to have been at issue is tortured. Disputes over discovery arose immediately, foreshadowing a three year battle over the scope and priority of discovery. The essential conflict between plaintiffs and defendants persisted through court hearings, Local Rule 7(c) conferences and referrals to magistrates. Defendants took the position from the outset that plaintiffs' claims had no merit and that discovery should be held to the five partnerships in which plaintiffs invested. Plaintiffs stood by their broader allegations of a national fraudulent scheme involving many more parties than had been named in the original suit, whose identities would only become clear in the course of discovery.[7]

The Court sought to resolve this fundamental conflict between the parties by referring the case to the Honorable David Noce, United States Magistrate, for clarification and resolution of discovery disputes. Judge Noce conducted two separate hearings on discovery and issued orders ruling on the proper scope and order of further discovery in the case. Judge Noce's orders prompted two separate petitions to the Eighth Circuit for extraordinary relief, the first by plaintiffs protesting that the scope had been set too narrowly, the second by defendants protesting that the scope was over-broad. The Eighth Circuit denied both petitions.

The Court involvement in the discovery process did not eliminate the difficulties. Plaintiffs persisted in their efforts to discover documents beyond the scope of the Magistrate's order. Defendants continued to object to plaintiffs' requests and to insist that plaintiffs submit to discovery requests to reveal the facts upon which their claims were based. By the time this

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[7] Plaintiffs' first action in this case was the filing of a motion to have this matter declared complex litigation. This motion was accompanied by a motion for a protective order to shield plaintiffs from the obligation of revealing the theory of their case "prematurely." Both motions were denied by order of Judge Noce on September 14, 1983.

Court inherited this case the file had grown to eight volumes, six of which contained primarily motions to compel and objections thereto.

The parties to this action met with this Court in chambers on July 31, 1985 with the purpose of entering into a stipulated agreement to complete discovery and move the case to trial. Plaintiffs submitted a proposed order to the Court. The stipulated agreement required that document production be completed in accordance with Judge Noce's order by August 31, 1985; that depositions would proceed thereafter; that all discovery would be complete by January 31, 1986; that dispositive motions would be filed by March 4, 1986; and that the case would proceed to trial on March 17, 1986. Plaintiffs' counsel informed the Court that he expected to take about two months in the presentation of plaintiffs' case.

This conference left the Court with the firm belief that the greatest interests of justice would be served by pushing this case, still in the early stages of preparation after three years, to trial. With that end in view the Court began to arrange its docket to assure that a minimum two month block of time would remain open beginning March 17, 1986. When, following the conference, a new flurry of discovery motions was forthcoming, threatening to reduce the litigation yet again to a battle of unproductive motion papers, the Court referred all discovery matters to the Honorable Robert Kingsland, United States Magistrate, for supervision and control.

Judge Kingsland took jurisdiction of the case on November 18, 1985 and immediately set a hearing to resolve outstanding disputes and arrange a schedule for depositions. When difficulties arose in the first scheduled depositions, this Court appointed a special master to oversee all future depositions. Although the schedule set was intensive, it appeared that discovery would be completed according to the parties' stipulated agreement.

On December 18, 1985, in the course of a hearing before Judge Kingsland, plaintiffs' lead counsel became ill. After reviewing the history of the case and giving consideration to the resources expended on the matter in the foregoing two months, the Court determined that the case should go forward as scheduled. This decision of the Court prompted a third petition by plaintiffs to the Eighth Circuit, which stayed discovery pending a hearing on writ of mandamus. After oral argument held January 14, 1986 the Eighth Circuit denied the writ and ordered an extension of the discovery cut-off date until February 19, 1986.

Discovery thereafter resumed on an intensive schedule involving daily depositions conducted in New York and Los Angeles as well as St. Louis under the supervision of a special master. Problems persisted, and plaintiffs protested that the schedule did not permit them proper preparation. The Court refused to continue the case.

On March 4, 1986 all defendants filed motions for summary judgment in accordance with the stipulated order. The gist of each motion was that plaintiffs had failed to come forward with any evidence of any fact that would support their claims. With their motions defendants filed substantial supporting documents tending to disprove plaintiffs' allegations. Nonetheless, in view of the extreme circumstances surrounding the final pre-trial stage of the case, the Court denied defendants' motions on March 14th. *See* Order of this Court dated March 14, 1986.

At the opening of trial on March 17th, prior to the commencement of voir dire, the Court announced that on reconsideration of defendants' motions it would vacate its March 14th order. The plaintiffs were then on notice as they commenced their case that the Court had once again taken defendants' motions under advisement. Defendants then formally renewed their motions on the record. Since the essence of

defendants' motions lay in plaintiffs' failure to produce any evidence in support of their claims, the Court admonished plaintiffs to come forward at the outset of trial with *anything* that would satisfy the Rule 56(e) burden on a nonmoving party on motion for summary judgment.

Trial proceeded for three-and-a-half days, during which time plaintiffs completed the direct examination of one witness. At that point the Court recessed the action. Plaintiffs were granted an additional ten days to file materials in opposition to defendants' motions prior to a hearing on March 31st. At the hearing plaintiffs argued fervently for their legal theories but once again failed to come forward with any evidence that supported any underlying fact of their complaint. The Court therefore granted defendantsR motions from the bench.

DISCUSSION

Summary judgment is an extreme remedy, ordinarily available only to a movant who "has established his right to judgment with such clarity as to leave no room for controversy and that the other party is not entitled to recover under any discernible circumstances." *Greco v. ABC Transnational Corp.*, 623 F.Supp. 104, 105 (E.D. Mo. 1985), citing *Steele v. Armour Co.*, 583 F.2d 393 (8th Cir. 1978). The burden of proof is on the moving party, and the Court should not grant summary judgment unless it is convinced that there is no evidence to sustain a recovery under any circumstances. *Buller v. Buechler*, 706 F.2d 844, 846 (8th Cir. 1983). The party opposing a motion for summary judgment, however, cannot rest upon the mere allegations of his pleadings, but "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). *See generally* 10A Wright & Miller *Federal Practice & Procedure* §2739 (1985). Where the nonmoving party fails to meet this obligation, summary judgment serves a "salutory purpose in avoiding a useless, expensive, and time consuming trial where there is no genuine, material fact to be tried." *Steele, supra.*

It is the judgment of this Court that plaintiffs have failed to meet the burden placed upon them by defendants' motions. After hearing plaintiffs' evidence at trial and reviewing the documents submitted in opposition to defendants' motions, the Court concludes that plaintiffs are without evidence to support any of the factual allegations of their complaint, and that a two month trial would involve the parties and the Court in needless — if not abusive — delay and expense. *See Fontenot v. Upjohn Co.*, 780 f.2d 1190, 1195 (5th Cir. 1986).[1]

The sole piece of evidence plaintiffs have submitted that tends to support any of their allegations is the affidavit of Frank Johnson, obtained after trial of the case had already begun, in which the affiant states from personal knowledge that defendant W.A. Davis paid considerably less for certain foreign films purchased in 1975 than the price at which the films were entered in the account books of the partnership for which they were purchased. This single affidavit does not only represent a meager evidentiary challenge to the substantial array of documents assembled by defendants directly disproving the allegations on which plaintiffs seek to go forward: the affidavit contains no attestations of any facts at issue in this case. The

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[1] The crucial question for the court is whether there is a "genuine issue" of fact concerning any essential element of the claim on which judgment is being sought. If the moving party can show that there is no evidence whatever to establish one or more essential elements of a claim on which the opposing party has the burden of proof, trial would be a bootless exercise, fated for an inevitable result but at continued expense for the parties, the preemption of a trial date that might have been used for other litigants waiting impatiently in the judicial queue, and a burden on the court and the taxpayers. Aside from counsel's fees, which this court has frequently fixed at rates of $100 per hour or more, a Rand Corporation study has estimated the public cost of the average jury trial in federal court to be over $7000. [footnote omitted] Hence, every hour of litigation is costly both to the parties and the taxpayers, and the expense should not be incurred needlessly.

Fontenot v. Upjohn Co., 780 F.2d 1190, 1195 (5th Cir. 1986).

business negotiations as to which Mr. Johnson claims personal knowledge did not involve any of the partnerships in which plaintiffs invested and hence do not substantially support any allegations concerning those partnerships. Mr. Johnson attests to negotiations solely with defendant Davis, and in no way implicates the other named defendants to this action. Further, Mr. Johnson's averments with respect to the rates of commission demanded by R. Rowland & Co. do not tend to establish any wrongdoing by that defendant, as they fall within the amounts disclosed in the offering memorandum as having been allocated to finders' fees, brokers' commissions and comparable disbursements.

With respect to plaintiffs' specific claims, this Court finds that plaintiffs have failed to come forward with any evidence supporting essential elements of each cause of action. Thus, defendants are entitled to judgment as a matter of law. *Fontenot, supra.*

Plaintiffs have submitted no evidence that would support a finding of fraudulent misrepresentation by any defendant.[9] In fact, the extensive testimony of defendant Hermann Schwartzmann tended substantially to demonstrate that the offering memoranda distributed to plaintiffs prior to their investments made exhaustive disclosure of the partnership organization and risk factors. Material misrepresentation is an essential element of both 10b-5 and common law fraud.

Defendants through deposition testimony of plaintiffs established that none of the plaintiffs had in any case relied upon the offering memoranda or, by implication, any alleged misrepresentations included therein. Defendants thereby disproved an essential element of both 10b-5 and common law

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[9] As indicated above, the affidavit of Frank Johnson does not contain averments concerning any partnership in which any plaintiff invested.

fraud. In lieu of submitting any evidence of reliance to counter defendants' proof, plaintiffs argued extensively that the instant case should be regarded as an omissions case, in which reliance should be presumed. *See Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972). The Eighth Circuit has held that the *Affiliated Ute* rule does not extend to cases in which omissions are alleged in a document, reasoning that in such a case there is no need to presume reliance. *Vervaecke v. Chiles, Heider & Co.,* 578 F.2d 713 (8th Cir. 1978). Plaintiffs have therefore failed to come forward with evidence on an essential element of their claims under 10b-5 and common law fraud.

Plaintiffs do not indicate that they have evidence in support of their allegations of breach of fiduciary duty or theories of racketeering activity.

Judge Meredith in 1983 declined to dismiss plaintiffs' complaint solely on the ground that plaintiffs had pleaded fraudulent concealment. Three years later plaintiffs are without anything to support that pleading. Without proof of such concealment, all of plaintiffs' claims are barred by the statute of limitations. Plaintiffs have submitted excerpts of depositions indicating that they did not suspect the fraud until they discussed these investments with Don Doerge, a former broker with R. Rowland & Co. in 1980. This testimony does not satisfy plaintiffs' burden on the issue of fraudulent concealment. The vast amounts of discovery materials contain no evidence of active conduct by defendants subsequent to the alleged wrongdoing that precluded earlier discovery of the claims. *See Hasenyager v. Board of Police Commissioners,* 606 S.W.2d 468, 472 (Mo.App. 1980).

Upon critical review of the file in this case and the history of its growth, this Court regrets the profligation which the case represents. *See Jaquette v. Black Hawk County, Iowa,* 710 F.2d 455 (8th Cir. 1983). An inordinate amount of court time has been devoted to this case, both at the trial and appellate

levels. The Court has been extensively and unusually involved in the discovery process, although this involvement does not seem in any way to have smoothed the matter's progression to trial. Preparation of the case has also been an extraordinary expense to the parties.[10]

Throughout the course of this litigation defendants have raised serious challenges to the submissibility of plaintiffs' case, beginning with objections to the suit as time-barred, proceeding through protestations of complete ignorance of any facts to support the claim, and concluding with motions for summary judgment asserting in substantial terms that plaintiffs are entirely without evidence to support any of their claims. In the face of these challenges and in view of the extreme circumstances under which final preparation for trial was completed, the Court has sought to give plaintiffs every benefit and every opportunity to prove their case. *See* Order of this Court dated March 27, 1986. Plaintiffs were given the benefit of relaxed standards of pleading on their RICO count. They were permitted to file pre-trial materials that failed in almost every particular to comply with the pre-trial order of this Court. They were permitted to proceed to trial without meeting the obligations to respond substantively to defendants' motions for summary judgment. They were permitted to introduce previously unidentified exhibits at trial according to a numbering system understood only by them. The Court permitted this in the interest of providing plaintiffs every opportunity to demonstrate that a trial of this matter was warranted.

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[10] Plaintiffs' counsel filed an affidavit with the Eighth Circuit two weeks before trial averring that the litigation had already cost plaintiffs alone in excess of $197,000, which, the Court is saddened to note, is an amount in excess of the amount of investment capital placed at risk by plaintiffs in 1975 and 1976.

IT IS FURTHER ORDERED that plaintiffs' motion for default judgment against defendant W.A. Davis be and is denied. The general rule with regard to entry of judgment of default against one of several defendants who may be found jointly and severally liable on plaintiff's claim is set forth in *Frow v. De la Vega,* 82 U.S. 552 (1872). The Supreme Court in *Frow,* reasoning that any other holding could result in inconsistent verdicts, held that entry of judgment against the party in default must await adjudication of liability on the merits with regard to the answering parties. Whatever judgment subsequently entered against those parties would thereafter run against the defaulting party as well. The *Frow* rule has been extended to grant to a defaulting party the benefits of a successful motion to dismiss, *Barnes v. Boyd,* 8 F.Supp. 584 (4th Cir. 1934), *cert. denied,* 294 U.S. 723, aff'd on other grounds, 73 F.2d 910, as well as a successful motion for summary judgment, *Davis v. National Mortgagee Corp.,* 349 F.2d 175 (2d Cir. 1965). The summary judgment in this case therefore accrues to the benefit of defendant Davis as well as to those parties who have actively defended against plaintiffs' claims. Any other result would indeed be inconsistent and unsupportable. *See generally* 10 Wright & Miller *Federal Practice & Procedure* §2690 (1985).

IT IS FURTHER ORDERED that plaintiffs' motion to strike the pleadings of defendant Preston for failure to attend his deposition be and is denied. For the reasons elaborated above, defendant Preston enjoys the benefit of the summary judgment entered in this case.

IT IS FURTHER ORDERED that plaintiffs' motion for continuance of the trial setting for improper adjournment be and is denied as moot.

Dated this 17th day of April, 1986.

/s/ George F. Gunn
United States District Judge

APPENDIX D

Partnership	Date of Prospectus	Organizer Corporation	Amount to Cohen/ apiro Corp.	Total from Investors
Road Group	08/06/74	Irving Cohen & Associates	102,000	1,022,000(a)
Dumont Group	11/05/74	ICA	129,800	1,124,000(b)
Leonor Group	12/12/74	ICA	112,200	1,124,000(c)
Northern Hills	06/11/75	Irving Cohen & Associates	$131,600	$818,000(d)
Marblehead	07/01/75	ICA	240,000	1,200,000(e)
Newton	08/18/75	ICA	265,000	1,240,000(f)
Woodhaven	08/28/75	ICA	129,800	624,000(g)
Alpine	10/01/75	Irving Cohen & Associates	293,000	1,487,000(h)
Somerset	10/10/75	ICA	175,000	720,000(i)
Asbury	10/21/75	ICA	389,000	1,577,000(j)

a. Def. App. 1823-26; b. Def. App. 1827-30; c. Def. App. 1831-34; d. Def. App. 1839-42; e. Def. App. 1843-48; f. Def. App. 1849-53; g. Def. App. 1854-57; h. Def. App. 1763-67; i. Def. App. 1796-1800; j. Def. App. 1858-61.

Monticello	12/08/75	ICA	186,400	720,000(k)
Brighton	12/12/75	Astor	265,000	960,000(l)
Avalon	03/18/76	Astor	190,000	990,000(m)

k. Def. App. 1862-65; l. Def. App. 1866-70; m. Def. App. 1781-84, 1793-94; (Commissions and Finders Fees were not included in above schedule.)

Davis Partnerships, as now known to Plaintiffs, are as follows:

Partnership	Date of Prospectus	Organizers	Amount to Davis's Corp.	Amount from Investors
Palm Air	11/27/74	Davis-Rand	63,150	420,000(n)
Lakeworth	12/12/74	Davis-Rand	52,500	440,000(o)
Coastal	12/12/74	Davis-Rand	54,000	450,000(p)
Ruby	12/20/74	Davis-Rand	57,750	480,000(q)
Antares	4/16/75	Davis-Rand	57,750	480,000(r)
Cyress	8/27/75	Davis-Preston	62,500	520,000(s)

n. Def. App. 1871-74; o. Def. App. 1879; p. Def. App. 1880-83; q. Def. App. 1884-87; r. Def. App. 1736-40, 1743; s. Def. App. 1749-50, 1755-56, 1760; (Commissions and Finders Fees were not included in above schedule.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-950C(6)

Jack Bastien, et al.,
Plaintiffs,

vs.

R. Rowland & Co., et al.,
Defendants.

ORDER
(Filed November 8, 1985)

IT IS HEREBY ORDERED that the joint motion of defendants for protective order be and is denied. As this Court reads the January 26, 1984 order of the Honorable David Noce regulating discovery in this case, the Magistrate permitted plaintiffs to request document production beyond the partnerships in which they had actual investment interests to the extent they could demonstrate that production might lead to the discovery of admissible evidence. The Magistrate sought to limit the potentially inexhaustible reach of such discovery by holding plaintiffs to production requests relating to no more than five additional partnerships in which defendants were engaged. This Court reads the Magistrate's order as permitting such discovery into the affairs of five additional partnerships for each defendant. Plaintiffs' counsel has requested production with respect to twelve additional partnerships, giving rise to defendants' motion. In accordance with this Court's interpretation of the Magistrate's ruling, defendants shall produce the requested documents for plaintiffs' inspection.

In response to plaintiff's Motion to Resolve Issue in Connection with Defendant Shapiro's Claim of Privilege as to Plaintiffs' Motion to Inspect Documents,

IT IS FURTHER ORDERED that defendant Shapiro shall produce the documents as to which privilege is claimed for *in*

camera inspection. Defendant shall produce the documents on Friday, November 22, 1985 at 4:00 p.m.

IT IS FURTHER ORDERED, that, upon resolution of defendant's claim of privilege, defendant Shapiro shall comply with the order of the Magistrate of January 26, 1984 as adopted by order of Court 4 on June 28, 1984 and by further order of this Court on September 3, 1985.

IT IS FURTHER ORDERED that the motion of plaintiffs for sanctions against defendant Shapiro be and is denied.

IT IS FURTHER ORDERED that the motion of defendant Shapiro for sanctions against plaintiffs be and is denied.

IT IS FURTHER ORDERED that the motion of plaintiffs for sanctions against defendant Harold Rand individually and Harold Rand d/b/a Harold Rand & Co., Public Relations, be and is denied. An entry of appearance as counsel for defendant Rand has only recently been filed. The Court fully expects defendant, now that he is represented by counsel, to comply fully and expeditiously with outstanding discovery orders of this Court.

This case has now been under court-directed discovery for over two years and has generated volumes of motion papers that have yielded a minimum amount of discovery material. The lack of cooperation among the parties has taxed the resources of clients, the patience of counsel, and the time of the Court. The Court admonishes counsel, not for the first time, to seek to effectuate the spirit of Local Rule 7(c) and strive to resolve discovery disputes independently. The Court further reminds counsel of the discovery deadline of January 32, 1986. This case is set for trial March 17, 1986, and the Court fully expects to try it at that time.

Dated this 8th day of November, 1985.

_____

United States District Judge

5. Part of said order required the parties to comply with all discovery orders previously made by Judge Noce and Judge Cahill.

6. Immediate resistance arose from certain Defendants and various motions have been filed to obtain compliance from said Defendants and to have this Court resolve disputes as to the *scope of discovery* and to have this Court *impose sanctions.*

7. Presently pending before this Court are the following matters:

		Date Filed
1.	Plaintiffs' Motion to Resolve Issues in Connection with Defendant Shapiro's Claim of Privilege as to Plaintiffs Motion to Inspect Documents.	8/19/85
2.	Joint Motion of Defendants for Protective Order	8/23/85
3.	Reply of Defendant Shapiro to Plaintiffs' Motion to Resolve Issues in Connection with Defendant Shapiro's Claim of Privilege.	8/24/85
4.	Response of Plaintiffs to Defendant's Joint Motion for Protective Order received on or about 8/23/85, and Plaintiffs' Motion to Implement Judge Noce's order and Memorandum of January 26, 1984.	8/30/85
5.	Objections and Response of Defendants R. Rowland and Co., Raymond E. Rowland, Jr. and Robert R. Rust to Plaintiffs second request for production of documents.	9/20/85

6.	Objection of R. Rowland and Co., Raymond E. Rowland, Jr. and Robert R. Rust to Plaintiffs' first interrogatories.	9/20/85
7.	Motion to Compel Defendant Shapiro to comply with Court order to answer interrogatories and request for sanctions.	9/27/85
8.	Motion to compel production of documents directed against Defendant Shapiro, and for sanctions for willful contempt of Court orders.	10/1/85
9.	Motion to dismiss of Defendants Irving Cohen, I.C.A. Productions, Inc., Irving Cohen and Associates Investor, Inc. d/b/a Irving Cohen and Associates, Inc., and Stanley Levine to the first amended complaint.	10/7/85
10.	Memorandum of Defendant Ted Shapiro in opposition to Plaintiffs' motion to compel answers to interrogatories and request for sanctions and Defendant Shapiro's motion for sanctions under Rule 11.	10/8/85
11.	Memorandum of Defendant Ted Shapiro in opposition to the Plaintiffs' motion to compel production of documents and request for sanctions.	10/11/85
12.	Amendment to the memorandum of Defendant Ted Shapiro in opposition to the Plaintiffs' motion to compel productions of documents and request for sanctions.	10/14/85

13.	Plaintiffs refile Plaintiffs motion for sanctions against Harold Rand individually and Harold Rand, d/b/a Harold Rand & Co., Public Relations, for failure to comply with Court's order to produce documents.	10/15/85
14.	Plaintiffs Memorandum in response to Defendant Ted Shapiro's memorandum in connection with Plaintiff's motion to compel answers to interrogatories and for sanctions.	10/18/85
15.	Plaintiffs' memorandum in response to Defendant Ted Shapiro's memorandum in opposition to Plaintiffs' motion to compel production of documents and request for sanctions.	10/18/85
16.	Motion to Compel Defendant Cohen to comply with Court order to answer interrogatories and request for sanctions.	10/21/85
17.	Plaintiffs' Response to Defendant Cohen's motion to dismiss RICO Count.	10/22/85

LUPO & STEMMLER
Attorneys and Counselors
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St. Louis, Missouri 63101

314-436-4130

David G. Lupo, P.C.
James A. Stemmler
Springfield Baldwin

George L. Stemmler
(1895-1978)

January 6, 1986

Honorable Lackland H. Bloom
6787 Westway Road
St. Louis, MO 63109

Re: Bastien v. R. Rowland & Co.
Cause No. 82-950 C (6)
Our File No. 2401

Dear Judge Bloom:

We represent the Plaintiffs in the above styled action. This letter is in response to your letter requesting a list of individuals who we wish to depose. What follows is a *partial* list of deponents. We are in the process of reviewing documents recently received from various Defendants pursuant to Court orders. When all the documents have been received and reviewed we will submit additional names to the following list. Other names may surface from the taking of depositions. Other investors will also be deposed upon the Court releasing the present restrictions.

Ted Shapiro (Defendant)
Irving Cohen (Defendant)
Harold Rand (Defendant)
Richard Davis (Defendant)

Joel Preston (Defendant and appraiser)
Herman Schwartzman (Defendant)
Bernard Troy (Defendant)
Howard Jacobs (Defendant)
Howard Mann (Defendant)
Ed Fingerman (Defendant)
Stanley Levine (Defendant)
Official at U. S. Copyright Office
James Wilcox (broker)
Don Doerge (broker)
* Jim McAtee (broker)
* Paul Martin (broker)
* John Ross (broker)
* Richard Senturia (broker)
* Joe George (broker)
Gary Domke (broker)
Paul Frazier (broker)
* Bruce Mills (broker)
Chuck Jones (broker)
Ralph E. Donnelly (appraiser)
Leo Pillot (appraiser)
Munio Podhorzor (appraiser)
Richard Gordon (appraiser)
Robert Newqart (appraiser)
Kenneth Schwartz (appraiser)
Vincent Borelli (appraiser)
Norman Stein (film laboratory)
Anthony Bruno (film laboratory)
Officer — Warner Brothers Film Lab
Officer — Precision Deluxe Film Lab
Marvin D. Skinner (film laboratory)
Steven Minasian (distributor)
Art Greenfield (distributor)
Joseph Green (distributor)
Officer — National General Pictures (distributor)
Officer — S. J. International Pictures (distributor)
Officer — Thaddeus Distributing Co. (distributor)

Officer — E.D.P. Films Inc. (distributor)
Officer — Warner Brothers Distribution Co. (distributor)
Robert Kaplan (distributor)
Officer — Independent Int'l. Pictures Corp. (distributor)
Officer — Cinema Shares Int'l Dist. Corp. (distributor)
Officer — New World Pictures (distributor)
Officer — Gades Film International Ltd. (distributor)
Stanley Levitch (accountant)
Eli Boyer (accountant)
Elain Tiegen (accountant)
* Program Director — KTVI TV Channel 2
* Manager — KDNL TV Channel 30
Officer — First National City Bank — New York
Officer — Bank of Commerce — New York
Officer — Chemical Bank — New York
Morrie Engle (accountant)
Sandy Wolff (broker)
S. Schoen (broker)
Warren Berger (broker)
Representative — Internal Revenue Service

Please note that the great majority of the listed deponents reside primarily in New York and California. To the best of our knowledge only eight of the listed deponents live in the St. Louis area. The deposition schedule must be adjusted accordingly.

* Reside in St. Louis

Very truly yours,

/s/ James A. Stemmler

JAS/rb

cc: all attorneys of record

Depositions Actually Taken and Dates

Depositions Actually Taken	Date	Taken By	Location
Robert Rust	09/27/83	Plaintiff	St. Louis
Mike Kickham	11/16/83	Defendant	St. Louis
Robert Rust	12/11/85	Plaintiff	St. Louis
R. Rowland	12/12/85	Plaintiff	St. Louis
Mike Kickham (2nd time)	12/13/85	Defendant	St. Louis
Arla Reed	12/16/85	Defendant	St. Louis
Ronald Burt	12/17/85	Defendant	St. Louis
Lou Werner	12/18/85	Defendant	St. Louis
Arthur O'Hare	01/22/86	Defendant	St. Louis
Jack Bastien	01/23/86	Defendant	St. Louis
Tom Yeager	01/24/86	Defendant	St. Louis
Nile Farnsworth	01/27/86	Defendant	St. Louis
Mike Kickham (3rd time)	01/29/86	Defendant	St. Louis
Lou Werner (2nd time)	01/29/86	Defendant	St. Louis
Ronald Burt (2nd time)	01/30/86	Defendant	St. Louis
Arthur O'Hare (2nd time)	01/30/86	Defendant	St. Louis
Jane Tschudy	01/31/86	Defendant	St. Louis
Robert Krieg	02/03/86	Defendant	St. Louis
James Nolan	02/03/86	Defendant	St. Louis
David Wells	02/05/86	Plaintiff	St. Louis
Jack N. Ross	02/05/86	Plaintiff	St. Louis
James K. McAtee	02/05/86	Plaintiff	St. Louis
Robert Tschudy	02/06/86	Defendant	St. Louis
Vernon Kluge	02/06/86	Defendant	St. Louis
Granville Mitchell	02/07/86	Defendant	St. Louis
Harold Rand	02/10/86	Plaintiff	New York
Stanley Levine	02/10/86	Plaintiff	New York

Ted Shapiro	02/11/86	Plaintiff	New York
Irving Cohen	02/11/86	Plaintiff	New York
Stanley Levitch	02/12/86	Plaintiff	New York
Pola Harris-Moore, Cinemashares International Television	02/12/86	Plaintiff	New York
Herman Schwartzman	02/13/86	Plaintiff	New York
Howard Jacobs	02/13/86	Plaintiff	New York
Ed Fingerman	02/14/86	Plaintiff	New York
Howard Mann	02/14/86	Plaintiff	New York
Bernard Troy	02/14/86	Plaintiff	New York
Art Greenfield, distributor	02/18/86	Plaintiff	California
Shelly Presser, Atty. and officer, Warner Bros. Inc.	02/18/86	Plaintiff	California
Eli Boyer	02/19/86	Plaintiff	California
Morrie Engle	02/19/86	Plaintiff	California
Marla Muse (Copyright Office)	02/21/86	Plaintiff	Washington, D.C.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 86-1016/1032/1096

In Re: Jack D. Bastian, et al.,
Plaintiffs-Petitioners,

and

David G. Lupo, et al.,
Petitioners.

PETITION FOR WRIT OF MANDAMUS

The petitions for rehearing en banc are denied. The supplemental pleadings to the writ of mandamus and motion for rehearing en banc and amendment filed in cases 86-1032 and 86-1096 are all denied. These denials are without prejudice to petitioners' right to raise the same issues on appeal from a final judgment, and without prejudice to the petitioners' right to seek relief from the district court on new matters not previously presented to the district court.

March 18, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-950C(6)

Jack D. Bastien, et al.,
Plaintiffs,

v.

R. Rowland & Co., Inc., et al.,
Defendants.

ORDER AND MEMORANDUM
(Filed March 13, 1986)

IT IS HEREBY ORDERED that the motion of defendants Harold Rand and Harold Rand Public Relations for summary judgment be and is denied.

IT IS FURTHER ORDERED that the motion of defendant Laventhol & Horwath for summary judgment be and is denied.

IT IS FURTHER ORDERED that the motion of defendants R. Rowland & Co., Raymond E. Rowland, Jr. and Robert Rust for summary judgment be and is denied.

IT IS FURTHER ORDERED that the motion of defendants Weiss, Rosenthal, Heller, Schwartzmann, et al. for summary judgment be and is denied.

IT IS FURTHER ORDERED that the motion of defendants Irving Cohen, Stanley Levine, Irving Cohen & Associates, Inc., ICA Productions Corp., Ted Shapiro, and the Astor Group for summary judgment be and is denied.

IT IS FURTHER ORDERED that the motion of these defendants to dismiss Count I of plaintiffs' complaint (RICO) be and is denied.

IT IS FURTHER ORDERED that the motion of these defendants to sever be and is denied.

This case arises out of the sale and purchase of limited partnership interests in a number of motion picture distributorships in 1975-76. Plaintiffs, who invested in five separate limited partnerships organized by defendants Cohen, Shapiro, Preston, Rand and Davis as tax shelters, seek to recover for damages suffered as a result of alleged misrepresentations and omissions by defendants. Plaintiffs seek recovery under Rule 10b-5, promulgated under the Securities and Exchange Act of 1934, common law fraud, conversion and breach of fiduciary duty. In September 1985 plaintiffs amended their complaint to add a count under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961 *et seq.* (1985). Also named as defendants in this action are the brokers through whom plaintiffs purchased their interests, the Rowland defendants; the accountants alleged to have reviewed the accounts of the partnerships at issue, Laventhol & Horwath; the attorneys responsible for preparing the offering memorandum in conjuction with the private placement sale of the limited partnership interests, Weiss, Rosenthal, Heller, Schwartzmann, et al.; and the initial limited partner of two of the limited partnerships, Stanley Levine. At the core of plaintiffs' complaint is an allegation of a broad-based conspiracy among the defendants to defraud plaintiffs of their investments through an interlocking system of limited partnerships structured to render a profit to defendants and to circumvent the registration requirements of the Securities Act of 1933.

This case was filed in March 1982 and developed major discovery problems almost immediately. The ensuing four years have been taken up largely in battling over the appropriate scope and order of discovery, a process that, before it was forced to conclusion by order of this Court on February 19, 1986, demanded the attention of four District Court Judges, two United States Magistrates and a retired St. Louis Circuit Judge appointed as Special Master to schedule and supervise depositions. The parties have petitioned the Eighth Circuit for ex-

traordinary relief on three separate occasions. Although the discovery deadline has passed, motions and objections continue to trickle into Court, consuming time and energy of counsel and Court that should now be directed toward trial.

Defendants have now filed motions for summary judgment on plaintiffs' complaint, arguing that after four years of discovery efforts plaintiffs have failed to come forward with any credible evidence in support of their claims. *See Fontenot v. Upjohn Co.*, ____ F.2d ____, No. 85-4201, slip op. (5th Cir. Jan. 17, 1986) (summary judgment appropriate where the party bearing the burden of proof fails to produce evidence in support of its claim).

As an initial matter, the Court notes that defendants filed their motions on March 4, 1986, less than two weeks before trial and well past the deadline prescribed by Local Rule 7(H) (dispositive motions not accepted later than 30 days in advance of trial except for good cause shown). Plaintiffs, burdened with trial preparation, have scarcely had an adequate amount of time to respond. For this reason alone the Court finds denial of defendants' motions appropriate.

Furthermore, the Court finds that genuine issues of material fact remain, making summary judgment an inappropriate remedy in this case. *Buller v. Buechler,* 706 F.2d 844, 846 (8th Cir. 1983). As plaintiffs' case will be tried in its entirety, the allegations of conspiracy among the defendants defeat the arguments of Irving Cohen, et al. in support of severance of actions. Plaintiffs will be provided the opportunity to present their complete case to the jury in a single trial to commence as scheduled seven months ago.

Dated this 13th day of March, 1986.

/s/ George F. Gunn
United States District Judge

POINT 5

1. THE DISTRICT COURT, BY ITS ORDER OF *DECEMBER 19, 1985,* ERRED IN DENYING PLAINTIFFS' RULE 72(A) APPEAL FROM THE ORDER OF MAGISTRATE KINGSLAND MADE ON NOVEMBER 27, 1985 GRANTING DEFENDANTS' MOTION FOR SANCTIONS AGAINST PLAINTIFFS FOR NOT APPEARING FOR DEPOSITION ON THE DATES NOTICED BY DEFENDANTS, WHEN PENDING BEFORE THE COURT WERE PLAINTIFFS' MOTIONS FOR PROTECTIVE ORDERS AND REQUEST FOR DISCOVERY CONFERENCE; AND FURTHER, SAID RULING BY MAGISTRATE KINGSLAND WAS IN EXCESS OF THE ORDER OF JUDGE GUNN OF NOVEMBER 15, 1985, DIRECTING SAID MAGISTRATE TO HOLD DISCOVERY HEARINGS, AND WAS IN VIOLATION OF *RULE 37(b) AND VIOLATED THE DUE PROCESS RIGHTS OF PLAINTIFFS UNDER THE FIFTH AMENDMENT, U. S. CONSTITUTION, SINCE THERE WAS NOT ANY ORDER ISSUED BY THE COURT TO WHICH PLAINTIFFS FAILED TO COMPLY, NOR WERE PLAINTIFFS PERSONALLY GRANTED A HEARING BEFORE SAID ORDER WAS MADE;*

2. FURTHER, THE DISTRICT COURT ERRED IN ORDERING ON *DECEMBER 20, 1985* THE APPOINTMENT OF A SPECIAL MASTER TO HEAR ALL DEPOSITIONS AND THAT THE COST OF SAID MASTER TO BE PAID BY PLAINTIFFS' COUNSEL, WITHOUT REIMBURSEMENT FROM CLIENTS, AND DIRECTING PLAINTIFFS TO ANSWER QUESTIONS POSED AT DEPOSITIONS, WHEN SAID ORDER WAS BASED UPON A *VERBAL* ORDER MADE BY MAGISTRATE KINGSLAND ON DECEMBER 18, 1985 AT AN INFORMAL APPEARANCE BEFORE JUDGE KINGSLAND WITHOUT A COURT REPORTER AND NOT COMPLETED BECAUSE OF THE

ILLNESS OF PLAINTIFFS' COUNSEL, AND AS A RESULT, NEITHER PLAINTIFFS, NOR PLAINTIFFS' COUNSEL WERE GIVEN THE RIGHT OF AN INDEPENDENT JUDICIAL REVIEW BY SAID MAGISTRATE, AND WERE DEPRIVED OF THEIR RIGHTS UNDER RULE 72(a) TO AN INDEPENDENT REVIEW OF SAID MAGISTRATE'S ORAL ORDER BY THE DISTRICT COURT. THIS CONSTITUTED A USURPATION OF JUDICIAL POWER, AND A CLEAR ABUSE OF DISCRETION ESPECIALLY WHEN THERE WAS NOT A COURT ORDER ORDERING THE PLAINTIFFS, TO ANSWER SAID QUESTIONS POSED DURING DEPOSITION; IT BEING CLAIMED BY PLAINTIFFS THAT SAID QUESTIONS INVOLVED PRIVILEGES BETWEEN ATTORNEY AND CLIENT AND WORK PRODUCT; AND FURTHER, SAID RULING BY THE DISTRICT JUDGE WAS IN VIOLATION OF RULE 37(b) AND RULE 11 AND THE DUE PROCESS RIGHTS OF PLAINTIFFS AND PLAINTIFFS' COUNSEL UNDER THE FIFTH AMENDMENT OF THE U. S. CONSTITUTION.

a. FURTHER, THE DISTRICT COURT ERRED BY ITS ORDER OF MARCH 12, 1986 AMENDING HIS ORDER OF *DECEMBER 20, 1985* BY ASSESSING THE TOTAL COST OF THE SPECIAL MASTER TO THE PLAINTIFFS PERSONALLY, IN THE AMOUNT OF $10,338.72, AS REASONABLE COMPENSATION FOR THE SPECIAL COMMISSIONER IN ACCORDANCE WITH THE ORDER OF *DECEMBER 20, 1985,* IN THAT SAME WAS DONE WITHOUT NOTICE OR HEARING:

b. FURTHER, THAT THE DISTRICT COURT ERRED IN ITS ORDER OF *MAY 27, 1986* BY AMENDING HIS ORDER OF *DECEMBER 19, 1985* BY ASSESSING ALL OF THE EXPENSES OF ATTORNEY FEES AGAINST PLAINTIFFS' ATTORNEYS PERSONALLY WHEN SANCTIONS

WERE ORIGINALLY ASSESSED AGAINST THE PLAINTIFFS PERSONALLY AS SAID ORDER OF DECEMBER 19, 1985 BECAME FINAL TEN (10) DAYS FROM FINAL JUDGMENT.

c. FURTHER, THE DISTRICT COURT ERRED IN AMENDING HIS *MARCH 12, 1986* ORDER ON *MAY 8, 1986* BY ASSESSING ALL OF THE FEES OF THE SPECIAL COMMISSIONER AGAINST PLAINTIFFS' COUNSEL PERSONALLY WHEN SAID PREVIOUS ORDER OF MARCH 12, 1986 BECAME FINAL 10 DAYS AFTER FINAL JUDGMENT BY THIS ORDER AND COUNSEL ARE PLACED IN CONFLICT WITH CLIENTS. (Appellants-Plaintiffs' Brief p. 40-42)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-950C(6)

Jack D. Bastien, et al.,
Plaintiff,

vs.

R. Rowland & Co., Inc., et al.,
Defendants.

ORDER
(Filed November 27, 1985)

A hearing was held on November 26, 1985 at 2:00 p.m. before the undersigned United States Magistrate for the purpose of hearing any outstanding motions filed by the parties.

All defendants filed a motion to compel and for sanctions on November 20, 1985. This motion seeks to compel the attendance of plaintiffs at properly noticed depositions and to reserve deposition time for the taking of certainas yet unknown representatives of plaintiffs who participated in the decisions of plaintiffs to purchase the limited partnership interest at issue in this suit. At a hearing held before the undersigned magistrate on November 22, 1985, a schedule of the taking of depositions was established as to Robert Rust, Raymond G. Roland and the plaintiffs in this case. When the defendants become aware of the other parties that they need to depose, the representatives of plaintiffs, they should submit to this court a proposed schedule for the taking of depositions which will be ruled upon at that time.

All defendants are also seeking sanctions, including the recovery of expenses and attorney's fees incurred by defendants as a result of (1) attending a deposition properly noticed by defendants, at which plaintiff's counsel knew well in advance

that no plaintiff would appear, and (2) attending a purported protective order hearing on oral notice by plaintiffs, which hearing was never properly set by plaintiffs, and which never occurred.

IT IS HEREBY ORDERED that the plaintiffs pay to all defendants the recovery of expenses and attorney fees incurred by defendants as a result of these two occurrences. The defendant attorneys are ORDERED to submit to this court, on or before December 5, 1985, an itemized accounting of their expenses that arose out of these occurrences. The court at that time will determine the amount that is to be paid by the plaintiff to each defendant.

Defendant R. Rowland & Co., Inc., Raymond E. Rowland, Jr., and Robert Rust have filed a motion to strike the motion to compel answers to plaintiff's first interrogatories. The plaintiff has filed a motion to compel R. Rowland & Co., Raymond E. Rowland, Jr., and Robert Rust to answer interrogatories. These two motions shall be held in abeyance as the parties ARE HEREBY ORDERED to meet and comply with local rule 7(c) on or before December 3, 1985.

Defendant Cohen filed a motion for sanctions under rule 11 against plaintiffs and their counsel on November 8, 1985. This motion seeks an order imposing sanctions against plaintiffs and their counsel for their frivolous and burdensome motion to compel answers to interrogatories and requests for sanctions filed by plaintiffs against these defendants. Plaintiff has filed a motion to compel defendant Cohen to comply with the court order to answer interrogatories and requests for sanctions. IT IS HEREBY ORDERED that these parties meet and comply with rule 7(c) of the local rules on or before December 3, 1985.

Defendant Ted Shapiro and Ted Shapiro d/b/a The Astor Group, Ltd., IS ORDERED to submit to this court on or before Friday, November 29, 1985, those documents for *in camera* inspection to which he has asserted the attorney-client privilege. If

it becomes necessary for a hearing to be held on those documents, one will be scheduled in the near future. The plaintiffs' motion to compel production of documents directed against defendant Ted Shapiro and for sanctions for willful contempt of court orders has been rendered moot by the order of Judge Gunn on November 8, 1985. The plaintiffs' motion to compel defendant Shapiro to comply with the court order to answer interrogatories and request for sanctions is hereby held in abeyance. The parties ARE ORDERED to meet and comply with local rule 7(c) on or before December 3, 1985 regarding this motion.

The plaintiff has filed a supplemental motion to compel defendants' attorneys to answer specific document requests. Mr. Horgan, the attorney for the defendant attorneys, stated at the hearing that he will produce the documents that are at issue and in accordance with Judge Gunn's order of November 8, 1985. Mr. Horgan also stated that he will meet with the plaintiffs' attorney on or before December 3, 1985 in order to discuss any supplemental discovery problems. IT IS ORDERED that the parties meet in compliance with local rule 7(c) and discuss any discovery problems relating to the defendant attorneys on or before December 3, 1985.

ITI IS SO ORDERED.

/s/ Robert D. Kingsland
United States Magistrate

Dated: November ____, 1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-950C(6)

Jack D. Bastien, et al.,
Plaintiffs,

vs.

R. Rowland & Co., Inc., et al.,
Defendants.

ORDER
(Filed May 27, 1986)

In response to plaintiffs' motion to clarify filed with this Court on May 9, 1986, the Court enters the following clarification:

The oral order of November 27, 1985 of the Honorable Robert D. Kingsland, United States Magistrate, sustained by order of this Court entered December 19, 1985, imposed upon plaintiffs' counsel the costs incurred by defendants in attending scheduled depositions at which plaintiffs, on advice of counsel, failed to appear. In the same order, Judge Kingsland imposed on plaintiffs' counsel the prospective costs of a special master appointed to supervise remaining depositions in the case. These costs were imposed on plaintiffs' counsel as a sanction for perceived obstructionist tactics to which plaintiffs' counsel was resorting in the discovery phase of the above-styled action. It has been the understanding of the Court throughout that these sanctions ran against counsel rather than plaintiffs personally. To the extent that language in prior orders led to confusion on this point, this order should clarify the issue.

Payment of the $1,938.72 in expenses submitted to the Court by the Honorable Lackland H. Bloom, Special Master, was stayed by order of May 8, 1986 until May 16, 1986. This date having passed, the stay is no longer in effect. Accordingly, plaintiff's counsel is hereby ordered to make payment to Judge Bloom in compliance with the order of this Court of May 8, 1986.

Dated this 27th day of May, 1986.

/s/ George F. Gunn
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-950C(6)

Jack D. Bastien, et al.,
Plaintiffs,

vs.

R. Rowland & Co., Inc., et al.,
Defendants.

ORDER
(Filed November 22, 1985)

A hearing was held on November 22, 1985 at 9:15 a.m. before the undersigned United States Magistrate for the purpose of setting a date for a hearing on outstanding discovery motions and to set a schedule for the taking of depositions.

IT IS HEREBY ORDERED that the parties appear on Tuesday, November 26 at 2:00 p.m. for a hearing on outstanding discovery motions. Each party that has filed outstanding motions is ordered to file with this court on or before November 25, 1985, 12:00 noon, a statement of the outstanding motion(s) and the reason for the filing of said motion.

At the hearing on November 22, 1985, the following schedule for the taking of depositions was set. **IT IS ORDERED** that the deposition of Robert Rust be taken on December 11, 1985, commencing at 9:30 a.m. at the law offices of Lupo and Stemmler. **IT IS ORDERED** that the deposition of Raymond G. Rowland be taken on December 12, 1985, commencing at 9:30 a.m. at the law offices of Lupo and Stemmler. **IT IS ORDERED** that the deposition of Michael J. Kickham be taken on December 13, 1985 at 9:30 a.m. at the law offices of Bryan, Cave, McPheeters and McRoberts.

IT IS HEREBY ORDERED that the following depositions be taken at Bryan, Cave, McPheeters and McRoberts. **IT IS ORDERED** that the deposition of Arlo Reed be taken on December 16, 1985 at 9:30 a.m. **IT IS ORDERED** that the deposition of Ronald Rust be taken on December 17, 1985 at 9:30 a.m. **IT IS ORDERED** that the deposition of Louis Warner, Jr., be taken on December 18, 1985 at 9:30 a.m. **IT IS ORDERED** that the deposition of Thomas W. Yager be taken on January 2, 1986 at 9:30 a.m. **IT IS ORDERED** that the deposition of Jack D. Bastien be taken on January 3, 1986 at 9:30 a.m. **IT IS ORDERED** that the deposition of Jane S. Tschudy be taken on January 6, 1986 at 9:30 a.m. **IT IS ORDERED** that the deposition of Arthur F. O'Hare be taken on January 7, 1986 at 9:30 a.m.

IT IS SO ORDERED this 22nd day of November, 1985.

/s/ Robert D. Kingsland
United States Magistrate

Dated: November 22nd, 1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-950C(6)

Jack D. Bastien, et al.,
Plaintiffs,

vs.

R. Rowland & Co., Inc., et al.,
Defendants.

ORDER
(Filed December 20, 1985)

The defendants have filed a joint motion to compel answers to deposition questions regarding the basis of plaintiffs' claims. Judge Kingsland, in an in-chambers conference with Mr. Lupo, Mr. Horgon and Mr. Alber, instructed the plaintiffs that they are to answer questions that inquire into the facts underlying the plaintiffs' complaint. In accordance with Judge Kingsland's order of December 18, 1985, in chambers, this court, upon request of the defendants, hereby appoints a special master, at plaintiffs' cost, to oversee the remainder of the depositions, as it is deemed necessary by the parties and the special master. *See FedR.Civ.P.* 53.

In view of the history of the discovery proceedings in this case, it is the opinion of this court that the ends of justice compel the appointment of a special master to preside overall pending and future depositions in this case, lest there be a repetition of the obstructive tactics or further delay, waste, expense or more needless burdens cast upon this court. *Shapiro v. Freeman,* 38 F.R.D. 308 at 312 (S.D.N.Y. 1965).

IT IS THEREFORE ORDERED that the Honorable Lackland H. Bloom, a retired judge from the Missouri State 22nd Judicial Circuit, serve as a special master and shall have

full power to designate the time and place of all pending and future depositions in this case and to rule on all pending and future objections at the depositions. *Shapiro v. Freeman, supra* at 312. The fees and expenses of the special master shall not be charged as costs of the action; rather they shall be fixed by the court upon the special master filing at the conclusion of his services a report of time expended and shall be paid by plaintiffs' attorneys without reimbursement from their clients. *See Bardin v. Mondon,* 298 F.2d 235 (2nd Cir. 1961).

Any action taken or ruling made by the special master shall be subject to review by this court upon the application of any party aggrieved by such action or ruling, provided only that such application be made within three days after the action or ruling of which complaint is made.

The party seeking review shall, at his or her own expense, provide to the court a transcript of the proceedings before the master, if a court reporter was present, together with a concise statement of the issues and the contentions with respect thereto and points and authorities.

On any matter brought to the court for review, the master shall furnish to the court a statement of the problem and the reasons for his action, which statement may include the legal basis for his action.

When review is sought as to a matter arising in the deposition, the master may, in his discretion, order completion of the deposition pending review.

This appointment of a special master to preside over depositions in this case in no way alters the previously set deadline for discovery of January 31, 1986.

/s/ George F. Gunn, Jr.
United States District Judge

Dated: December 20th, 1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-950C(6)

Jack D. Bastien, et al.,
Plaintiffs,

vs.

R. Rowland & Co., Inc., et al.,
Defendants.

ORDER
(Filed May 8, 1986)

This Court entered an order on December 20, 1985 appointing the Honorable Lackland H. Bloom to serve as a special master in this case. It was ordered, at that time, that the fees and expenses of the special master should be paid by plaintiffs' attorneys, as a sanction, without reimbursement from their clients. This sanction was imposed upon plaintiffs' counsel with the intent to avoid any further dilatory or obstructive tactics by them.

On March 6, 1986, Judge Bloom filed, in accordance with this Court's order of December 20, 1985, a report of expenses incurred and time expended. Judge Bloom informed the Court that he had incurred expenses of $1,938.72 and requested a fee of $75.00 an hour for 112 hours totaling $8,400.00 for fees.

This Court, on March 12, 1986, accepted the petition for allowance of compensation and expenses finding the figures submitted by Judge Bloom to be reasonable. *See Morgan v. Kerrigan,* 530 F.2d 401 (1st Cir. 1976), *cert. denied, McDonough v. Morgan,* 426 U.S. 935 (1976). Plaintiffs' counsel thereafter filed a motion to set aside sanctions or stay payment until there is a final judgment. In light of that motion,

IT IS HEREBY ORDERED, in accordance with this Court's sanction order of December 20, 1985, that plaintiffs' counsel pay Judge Bloom his expenses of $1,938.72 on or before May 16, 1986 and pay to Judge Bloom $8,400.00, for his fee, within ten days of final judgment by the Court of Appeals.

Dated this 8th day of May, 1986.

/s/ George F. Gunn, Jr.
United States District Judge

POINT 1

THE DISTRICT COURT ERRED IN RESTRICTING PLAINTIFFS IN DISCOVERY AS TO DOCUMENT REQUESTS AND THEN ERRED IN NOT ENFORCING PRIOR COURT ORDERS PERMITTING PLAINTIFFS TO INQUIRE AS TO OTHER PARTNERSHIPS BY INTERROGATORIES AND DEPOSITIONS AND FURTHER ERRED IN RESTRICTING DEPOSITIONS ORIGINALLY TO SEVEN (7) HOURS AND THEN NOT PERMITTING PLAINTIFFS COUNSEL SUFFICIENT TIME TO PREPARE FOR DEPOSITIONS OR HAVE SEVEN (7) HOURS TO DEPOSE DEFENDANTS AND NON-PARTY WITNESSES SO THAT PLAINTIFFS COULD ESTABLISH THE COMPLETE AREAS NEEDED TO SUSTAIN THEIR VARIOUS ALLEGATIONS AND SAID ERRORS WERE AN ABUSE OF DISCRETION AND VIOLATION OF *RULE* 26(a) AND AMOUNTED TO A VIOLATION OF THE DUE PROCESS UNDER THE FIFTH AMENDMENT.

(a) BECAUSE OF THE RESTRICTIONS AS TO SCOPE OF DISCOVERY AND FAILURE TO RESPOND TO INTERROGATORIES AND THE FAILURE OF THE COURT TO REQUIRE DEFENDANTS TO RESPOND TO DISCOVERY OR GIVE TIME TO PLAINTIFFS TO SEEK ENFORCEMENT OF DISCOVERY, PLAINTIFFS WERE UNABLE TO DEVELOP IMPORTANT LINES OF QUESTIONING AS TO DOCUMENTS, IN THE INTERROGATORY AREA AND IN THE DEPOSITION AREA, TO ENABLE THEM TO COMPLETELY SUPPORT THEIR ALLEGATIONS.

(b) THE COURT ERRED IN REFUSING PLAINTIFFS THE RIGHT TO SUBPOENA WITNESSES, (PARTY/NON-PARTY) BEYOND THE 100 MILE LIMIT IN HOLDING THAT SUBSECTIONS (c) AND (d) OF 18 U.S.C. 1965 DID NOT APPLY.

POINT 2

THE DISTRICT COURT ERRED IN DENYING PLAINTIFFS' REQUEST FOR CONTINUANCE AND THE REQUEST TO WITHDRAW WHEN LEAD COUNSEL BECAME ILL AND REQUIRING COUNSEL, STEMMLER, TO TAKE THE CASE EVEN AFTER HE FILLED AN AFFIDAVIT THAT HE WAS NOT COMPETENT NOR EXPERIENCED IN THIS CASE NOR IN CASES INVOLVING SECURITY AND RICO MATTERS, AND SAID REFUSAL WAS AN ABUSE OF DISCRETION.

APPENDIX E

U. S. Constitution, Amendment V

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

18 U.S.C. § 401

§ 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as —

(1) Misbehavior of any person it its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 1965

§ 1965. Venue and process

. . .

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

28 U.S.C. § 1927 as amended

§ 1927. Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Rule 10b-5, Security Exchange Act

§ 240.10b-5 Employment of manipulative and deceptive devices

It shall be unlawful for any person directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(1) To employ any device, scheme, or artifice to defraud,

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Federal Rules of Civil Procedure

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion or other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 37. Failure to Make or Cooperate in Discovery; Sanctions

(b) Failure to Comply with Order.

(1) ***Sanctions by Court in District Where Deposition is Taken.*** If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) ***Sanctions by Court in Which Action Is Pending.*** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, uncluding an order made under subdivision (a) of this rule or Rule 35, of if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mantal examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of

this subdivision, unless the party failing to comply shows that the party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, made with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party upon whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the applica-

tion for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 59. New Trials; Amendment of Judgments

(d) On Initiative of Court. Not later that 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion To Alter Or Amend A Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 72. Magistrates, Pretrial Matters

(a) Nondispositive Matters. A magistrate to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. The district judge to whom the case is assigned shall consider objections made by the parties, provided they are served and filed

within 10 days after the entry of the order, and shall modify or set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law.

Local Rule 7(c)

Rule 7. Motions

(C) Motions Relating to Discovery.

With respect to all motions relating to discovery proceedings pursuant to Rules 26 through 37, inclusive, of the Federal Rules of Civil Procedure, the Court shall not, except for good cause, hear or consider any such motion unless counsel for the movant shall first advise the Court in writing that said counsel has conferred with the opposing counsel in good faith or has made reasonable efforts to do so, but that after sincere efforts to resolve differences have been made counsel are unable to reach an accord. This written statement shall recite, in addition to the foregoing, the date, time and manner of such conference, and the names of the individuals participating therein or shall state with specificity the efforts made to confer with opposing counsel with respect to any such motion.

Federal Rules of Criminal Procedure

Rule 42. Criminal Contempt

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act

of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.